

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	MB Docket No. 09-194
Empowering Parents and Protecting	)	
Children in an Evolving Media Landscape	)	

**COMMENTS OF PROFESSOR LILI LEVI**

I am a Professor of Law at the University of Miami School of Law. I have taught Communications Law for over 20 years, and my scholarship focuses on media policy.<sup>1</sup> I write in response to the Commission's request for comment in the above-mentioned proceeding.<sup>2</sup>

Both parental observation and social science research support the proposition that television can be a very effective educational tool for children. The goal of the Commission's children's educational television rules (E/I rules) is therefore entirely laudable. However, as noted by the NOI in this docket, it is questionable whether the rules have been as effective as intended.

The empirical studies of children's educational television since the adoption of the Commission's rules disclose mixed results, as reflected in the NOI. Although most

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<sup>1</sup> A *curriculum vitae* is attached for your reference as Appendix A.

<sup>2</sup> These Comments reflect my views and do not necessarily represent the views of the University of Miami School of Law.

This filing is necessarily abbreviated and focuses exclusively on children's educational television requirements. For further elaboration, I have attached the manuscript of a lengthier, scholarly article entitled A "*Pay or Play*" *Experiment to Improve Children's Educational Television* as Appendix B. The article is currently in the law review editing process and is slated to appear in final form in print in the Federal Communications Law Journal in March 2010.

broadcasters appear to be formally complying with the FCC's rules, the evidence (according to unofficial, non-FCC studies) shows a noteworthy decline in the amount of children's E/I programming and a consistent funneling of such programming to weekend mornings. Moreover, existing studies question the educational quality of a significant amount of the programming being broadcast over-the-air.

The fundamental problem with the children's educational television rules is that economic incentives, market developments, administrative enforcement limitations (including constitutional concerns), tension in regulatory goals, regulatory scarcity, and audience factors all create disincentives for the production of high quality children's educational programming – particularly of a cognitive character – by commercial broadcasters. The structural constraints will doubtless be magnified as technological changes put increasing pressure on the traditional model of commercial broadcasting.

High quality children's educational programming – particularly cognitive programming (which must necessarily be designed for narrow age bands) – is expensive to produce and garners relatively small audiences. Changes in the modern marketplace – the expansion of the global marketplace for programming to international outlets, the growing merchandising associated with at least some children's programming, and the transformation of children into a commodity-purchasing demographic for advertisers – have not eliminated the reality that children's educational programming is still largely unprofitable for broadcasters. The commercial, advertising-supported broadcast system will not on its own produce notable amounts of high-quality children's educational television programming. Especially in light of the Commission's limitations on advertising during children's television programming, most E/I programming will not be

self-supporting. Moreover, commercial broadcast programming is facing increasing competition from the array of educational offerings on PBS, cable and the Internet. Particularly as the declining status and profits of over-the-air television stations lead to an increasing concern with the bottom line, at least some broadcasters will likely cut further back on resources devoted to children's educational television.

Commission enforcement is also a problem, as are Commission transaction costs in tracking and assessing compliance. Children's advocates complain that challenges to broadcasters' compliance with the Commission's rules have gone unaddressed too long. But this is likely due not to arbitrary administrative inaction, but to the Commission's simultaneous desires to promote high-quality educational programming while appropriately respecting broadcaster editorial discretion. In light of broadcasters' economic incentives and the structure of the broadcasting industry, the Commission's goals have each pulled in different directions, leading to unimpressive results for child viewers on the commercial band.<sup>3</sup>

The final relevant factor concerns the preferences and viewing patterns of parents and children – the audience. Circumstances that lead the audience to become “destination viewers” make it difficult for broadcasters to compete for children's attention with the niche children's programming channels on cable. Moreover, many parents are under-informed with respect to the Commission's E/I rules and the meaning of the ratings.

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<sup>3</sup> Broadcast licensees are likely to argue in this proceeding that they pay more than lip service to their children's E/I programming obligations and that their programming is high in quality. Without challenging such claims on a program-by-program basis, and even conceding that there is some good children's E/I programming on commercial television, it seems to me clear that commercial broadcasters have nowhere near kept up with public television in generating creative, high quality children's E/I programming.

As a result of these factors, children’s E/I programming reform in the commercial sector will predictably be an uphill battle.<sup>4</sup> Thus, while retaining and enhancing the current rules (as some children’s advocacy groups have argued) would not necessarily constitute affirmatively bad media policy, the factors that militate against the production of high quality children’s E/I programming – not to mention the temporal cost of likely constitutional litigation by broadcasters – suggest choosing a different direction. As an administrative alternative, I propose that the Commission explore what might be called a “pay an E/I fee or play” alternative designed to promote high quality children’s educational programs on television.

A. *Five Evaluative Objectives:*

As the Commission evaluates updating the children’s E/I obligations, it should seek to encourage five objectives: high programming quality, generation of programming directed toward needs and age groups otherwise underserved in broadcasters’ local markets, flexibility for broadcasters to enhance innovation over time, administrability for the FCC, and informational empowerment for parents.

Moreover, as a practical matter, the rules most likely to be successful would be those that provide some sort of clear benefit to all the participants. Children would be benefited by access to an increased amount of high-quality programming geared to each age band in the community. Parents and children would benefit from easy access to accurate, complete and reliable information about available E/I programming, as well as

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<sup>4</sup> Some broadcasters are likely to claim that the E/I rules – either in their current or potentially enhanced forms – are unconstitutional under the First Amendment. I argue in the attached article that the rules would likely pass constitutional muster. (See Appendix B, Section II, pp. 24-35).

easily accessible and reliable independent ratings of the quality of programming. Broadcasters would be benefited by rules enhancing their flexibility in meeting their children's obligations – flexibility allowing them to innovate in response to economic conditions and each station's needs at any given time. Finally, the Commission would benefit from rules that would be comparatively easy to administer in order to promote accountability. All these practical objectives could be satisfied by a well-structured, two-pronged pay-or-play regime.

*B. Prong 1 – The “Pay” Prong: E/I Fees to Fund Public TV's Children's E/I Programming*

Quality of children's E/I programming is much more likely to be enhanced if a successful subsidy program for children's programming on public broadcasting stations were developed. Such an alternative might even lead to an increase in overall amount of educational programming for children. History shows that promoting children's television on non-commercial stations – which are not subject to the same economic incentives as their commercial counterparts – is likely to lead to the kinds of high quality results everyone would applaud. The question, then, is how to ensure adequate funding of such programming on public, non-commercial stations.

A focus on public television – rather than ceding the field to cable – is necessary for at least three reasons. First, not everyone has access to cable television – an estimated 20% of the American households with televisions do not subscribe to cable or satellite service (presumably for reasons of cost). Second, studies show that public television

programming is both more balanced – consisting of both cognitive and pro-social shows – and also overall of higher quality than cable television educational shows. Also, upon closer examination, there are limits to the diversity of children’s educational programming on cable. Third, the future of the cable business model is itself unclear. Currently, cable is sold to subscribers on a tiered basis, with groups of channels bundled into tiers. If that changes and subscribers are instead able to pay “a-la-carte” (only for the channels (or “mini-tiers”) that they want), then analogous profitability factors as have plagued broadcasters vis-à-vis children’s educational programming may bedevil cable as well.

History shows that government funding of children’s educational programming is not a viable method for promoting public television E/I development. Congressional funding of overall public broadcasting in the US has been consistently criticized as insufficient and often subject to ideological skirmishes. The specific history of children’s educational television is even more telling. In 1990, as part of the Children’s Television Act legislation, Congress created the National Endowment for Children’s Educational Television specifically to support children’s educational television programming. Unfortunately, however, Congress did not renew the funding for the endowment after 1995. History thus gives us reason to expect that Congress would not consistently fund public broadcasting children’s E/I programming efforts. In any event, even if the legislature had continued to appropriate funds under the Act, the endowment amounts would have been insufficient to promote significant growth in high-quality programming, which is particularly costly. The fundamental lesson to be learned from the failure of the endowment is that despite across-the-aisle rhetoric supportive of

children's education, it is unwise to rely on Congressional funding of programming in support.

An alternative to government funding is to require broadcasters to contribute a yearly E/I license fee into a public broadcasting fund. This could ameliorate public television's perennial funding problem by having commercial broadcasters help fund children's public programming. The objective of the fund would be to assure a baseline, in addition to existing public television children's E/I programming, of E/I programming to make up for shows that broadcasters opted not to air themselves.

The target amount should be the estimated cost of having public broadcasters air E/I programming at least equivalent to three hours per week for each stream of multicasting by all commercial broadcasters. The E/I fee could be established and allocated per broadcaster according to various plausible methods the comparative merits of which would most appropriately be explored in a public notice-and-comment context.

The E/I fee would be paid into a public television children's educational programming endowment fund akin to the original 1990 NECET fund. Disbursements from the fund would be made to public, non-profit producers of high quality E/I programming, preferably by an independent, non-governmental management entity.

Broadcasters could then earn credits that would reduce or offset their E/I fees if they decided to air children's E/I programming themselves, based on the quality and effectiveness of the programming they offer in serving otherwise underserved needs of the children in their markets.

Finally, because one of the difficulties facing children's E/I programming is apparently the lack of media literacy on the part of the audience, the independent

administrator of the E/I fund could be charged with the goal of increasing public understanding and awareness of the availability and benefits of such programming.

C. *Prong 2 – The “Play” Prong: Bounded Discretion*

The proposed E/I fee should be paired with an option that would allow stations to minimize or avoid the fee by airing E/I programming themselves. One of the major concerns about “pay or play” options is that they would lead to strategic gaming by broadcasters. Regulatory approaches that would invite licensees to end-run their public obligations are unacceptable. Any viable “pay or play” system must be structured in such a way as to: 1) minimize the possibility of such strategic end-runs, and 2) maximize the availability of high quality educational programming. This means that *Sponge Bob Square Pants* and programming of its ilk cannot count to reduce broadcasters’ fee obligations.

The broadcaster should receive increasing amounts of credit against its tax obligation in the degree that its own children’s E/I programming met needs otherwise underserved in the local market. This provision is particularly necessary because some types of children’s educational programming are not as underprovided as others, and any broadcaster attempts to respond to those disparities should be particularly rewarded. In other words, if – as children’s advocates complain – there is too much social rather than cognitive educational programming for certain age ranges in a broadcaster’s market, then a broadcaster’s airing of a high quality cognitive E/I show for an underserved child population could warrant the highest level of exemption from its E/I fee obligations.



Broadcasters' obligations to pay the E/I fee should only be reduced or eliminated if the stations air programming that is rated highly in comparison to other E/I programming. Those ratings should be based on nationally recognized rating surveys.<sup>5</sup> The E/I programming should be reviewed and rated for educational quality by rating organizations which must survey a substantial amount of E/I programming per year and rate programs on a curve (in rank order), rather than considering them singly. Those ratings organizations do not currently exist in any official way. The work of rating the child-friendliness of television shows and movies has been done by private advocacy groups and a few social scientists in connection with FCC regulatory reviews. An industry of independent rating institutions could develop, particularly if their work were publicly funded. It would be important for the ratings to be made publicly available and highlighted on the FCC's redesigned web site. The Commission's web site should not only display reputable, nationally recognized rating surveys, but also link to the public's assessments of those surveys. Broadcasters should be allowed to use the ratings to promote their shows. The rating results could be used to establish credits to offset the participating broadcasters' E/I fees.

Naturally, this kind of rating-based system proposal raises questions. For example, would it simply be an invitation to the creation of ratings services whose structure, like that of the corporate rating agencies, is likely to lead to bias toward either the broadcaster community or the child advocacy community? What would happen if, as is likely, ratings agencies differed in their assessments? If there were competing ratings services, on what basis would the Commission choose the ratings on which to rely for its

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<sup>5</sup> The broadcasters should also be limited in the degree to which they could aggregate their children's E/I programming to weekend mornings, although the increasing ease of time-shifting and the mobility of television viewing might make this somewhat less important as a practical matter.

E/I fee adjustments? Would content decisions ultimately be dictated by government through the disguise of private rating agencies?

Whatever the details, it is important that a pay-or-play option not turn into a tool for broadcasters to reduce their obligations to serve children. The structure of the proposed regime must account for broadcasters' incentives and be alert to the possibilities of gaming the system. It is important that the proposed approach be structured to minimize valuation problems and complexity, and permit appropriate monitoring.

The Commission has not seriously explored such an alternative. The Children's Television Act of 1990 refers to something of a sponsorship alternative, but it has been ineffective because it has not been interpreted in a fashion tailored to broadcasters' incentives. A well-crafted "pay or play" option enhances flexibility. Broadcasters can realistically and flexibly adjust to market conditions as assessed by the station at the relevant time. It permits the development of expertise (which may lead to higher quality children's educational programming) and offers broadcasters the possibility of branding some of their digital streams as child-friendly venues (see, e.g., Qubo).

The timing of this experiment is propitious, as American broadcasters have just switched to an entirely digital system and are presumably in the midst of determining the business models they will employ for their digital streams. It may be that some broadcasters will choose to air specialized children's programming streams in competition with cable. Changes in the children's television marketplace have led to greater profits flowing from some children's programming than had previously been the case, and the multiple programming streams enabled by the digital conversion means that over-the-air broadcasters can more profitably choose to program for niche audiences

than ever before. The ownership structures of other broadcasters might give some stations (such as ABC stations) to cable E/I programming (such as Disney fare) at favorable rates, thereby leading those stations to play rather than pay their E/I fees. At the same time, other broadcasters may well decide that paying for other entities to produce and air high quality E/I programming is more economical for them – even if they are compelled to pay far more than rock-bottom prices – than the confusion occasioned by attempts to find commercially viable E/I programming. The goal of the alternative proposed here is to provide a flexible regulatory regime that will use principles of bounded discretion to promote more and higher-quality children’s E/I programming than has been engendered thus far by the FCC’s approach.

*D. The Usefulness of Broadcaster “Buy-in” and Commission-Brokered Compromise:*

Of course, even proponents of a public interest fund approach recognize the “large obstacles” faced by prior broadcast tax proposals. In fact, the Commission declined to adopt a pay-or-play system several years ago because of its concerns with pricing-related administrability. Broadcasters have a powerful lobby on the Hill and significant clout with the local legislators whose electoral futures they affect. This is why, as a practical matter, it is important to get the broadcasters to “buy in” to the E/I fee system.

One of the major benefits of a serious public study of the subject is that it would begin revealing the parties’ comparative preferences among various alternatives. Not

only would the advantages and disadvantages of various possibilities be ventilated, but – perhaps even more importantly as a practical matter – the palatability of the approaches to each of the relevant parties could be comparatively established.

Depending on the details, and particularly when paired with a pay-or-play exemption, a reasonable E/I fee system might well be significantly more preferable to broadcasters than the current “three hour rule” – particularly in light of the possibility of strengthened enforcement under new legislation. Thus, an E/I fee system as proposed here might turn out to be more politically viable than would be predicted. As a practical matter, the Commission’s inquiry into this kind of system might lead to another negotiated compromise – akin to the negotiated Joint Proposal that was ultimately adopted by the Commission for the digital television E/I rules in 2006.

*E. The Need to Take a Bird’s Eye View:*

While educational programming for children is obviously desirable, it is useful to look at the question from a broader regulatory vantage point. Airtime programming decisions are a zero sum game. If all broadcasters in a market have to provide children’s educational programming on all their free program streams, they will be displacing some other kind of content that might otherwise air. The question then is whether a regulatory policy that creates significant incentives for the airing of such programming – even when the audience for it is already largely wedded to cable and public television – is unduly displacing the development of other, potentially less available, programming on the broadcast medium.

What programming other than children's fare should the Commission seek to nurture? Serious journalism – and particularly investigative journalism – is expensive and increasingly under-produced in today's media marketplace. Media analysts daily decry the death of the American newspaper. There is room for broadcasters to step into the breach and contribute to a journalistic renaissance. I have argued elsewhere that today's media shows a striking need for an expanded commitment to serious journalism, and that the Commission could require stations to expend a certain amount of resources on newsgathering and journalism.<sup>6</sup>

In light of society's need for serious journalism, I would respectfully caution the Commission to take the bird's eye view in this docket and assess children's television against other regulatory needs. While adopting a "pay or play" approach with adequate accountability provisions is not a perfect solution, it is a better alternative than automatic continuation or enhancement of the current children's E/I regime, particularly when considered in light of priorities beyond the promotion of children's educational television on every broadcast station.

Respectfully submitted,

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January 13, 2010

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<sup>6</sup> See generally Lili Levi, *In Search of Regulatory Equilibrium*, 35 HOFSTRA L.REV. 1321(2007) (suggesting, inter alia, that broadcasters be subjected to a requirement to spend a certain percentage of their gross advertising revenues on news and public affairs production and programming).

## **APPENDIX A**

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*reprinted in* FIRST AMENDMENT LAW HANDBOOK, 2007-2008 ed. 275 (Rodney A. Smolla, ed. 2007).

*Re: Person I Knew* (A Tribute to John Hart Ely), 58 U. MIAMI L. REV. 973 (2004)

*Professionalism, Oversight, and Institution-Balancing: The Supreme Court's "Second Best" Plan for Political Debate on Television*, 18 YALE J. REG. 315 (2001).

*Reporting the Official Truth: The Revival of the FCC's News Distortion Policy*, 78 WASH. U. L.Q. 1005 (2001)

*Reflections on the FCC's Recent Approach to Structural Regulation of the Electronic Mass Media*, 52 FED. COMM. L.J. 581-617 (2000)

*On the Mixed Cultures of Regulation and Deregulation*, 38 JURIMETRICS J. 515-544 (1998) (reviewing RATIONALES & RATIONALIZATIONS: REGULATING THE ELECTRONIC MEDIA, Robert Corn-Revere, ed.)

*Defamation & Privacy: Selected Bibliography 1997-1998*, AALS Defamation & Privacy Section Newsletter, Vol IV, No. 2 (December 1998)

*Comments*, The Association of American Law Schools, Section on Mass Communications Law 1997 Annual Conference Panel: Sex, Violence, Children & the Media: Legal, Historical and Empirical Perspectives, 5 COMMLAW CONSPECTUS 341-359 (Summer 1997)

*Not With a Bang But a Whimper: Broadcast License Renewal and the Telecommunications Act of 1996*, 29 CONN. L. REV. 243-287 (1996)

*The FCC, Indecency, and Anti-Abortion Political Advertising*, in Symposium, *Safe Harbors and Stern Warnings: FCC Regulation of Indecent Broadcasting*, III VILLANOVA SPORTS & ENT. L.J. 85-220 (1996)

*Challenging the Autonomous Press*, 78 CORNELL L. REV. 665 (1993) (reviewing LEE BOLLINGER, IMAGES OF A FREE PRESS (1991))

*The Hard Case of Broadcast Indecency*, 20 N.Y.U. REV. L. & SOC. CH. 49-178 (1992-93)

*Dangerous Liaisons: Seduction and Betrayal in Confidential Press-Source Relations*, 43 RUTGERS L.REV. 609-732 (1991)

SSRN page:

<http://hq.ssrn.com/submissions/MyPapers.cfm?partid=48216>



**PANELS/  
PRESENTATIONS**

Mass Communications Law Section, The Future of the Media Marketplace, AALS Annual Meeting, Jan. 9, 2010, New Orleans, LA

Communications Law and Innovation Conference, University of Louisville, Aug. 21-22, 2009, Louisville, KY

First Amendment Workshop: Broadcast Indecency: Much Ado About Nothing? Or Still Much to Do?, Southeastern Association of Law Schools Annual Meeting, Aug. 2, 2009 Palm Beach, Florida

The First Amendment and the Supreme Court: Annual Review of the First Amendment Decisions of the Supreme Court's October Term 2008, Annual Meeting of the Florida Bar, June 26, 2009, Orlando, Florida

Second Annual Junior Scholars in IP Workshop, March 27-28, 2009, MSU College of Law, Lansing MI

Indecency & Violence in the Media: *FCC v. Pacifica* 30 Years Later, The First Amendment Center, June 26, 2008, Washington D.C.

The First Amendment and the Supreme Court: Annual Review of the First Amendment Decisions of the Supreme Court's October Term 2007, Annual Meeting of the Florida Bar, June 21, 2008, Boca Raton, Florida

Information and the Information Economy Conference, Fordham Law School, May 2-3, 2007

Copyright and Culture: Contending Perspectives, Audrey Finkelstein UM Experience 2007, University of Miami, Coral Gables, Florida, Nov. 2, 2007

Future of Copyright Conference, University of South Carolina, Oct. 12, 2007

The First Amendment and the Supreme Court: Annual Review of the First Amendment Decisions of the Supreme Court's October Term 2006, Annual Meeting of the Florida Bar, June 29, 2007, Orlando, Florida

Mini-Symposium on C. EDWIN BAKER, MEDIA CONCENTRATION AND DEMOCRACY, University of Pennsylvania Law School, April 13, 2007

The FCC's Enforcement of Indecency Regulations, University of Florida School of Law, April 6, 2007

Media Reform, Reclaiming the First Amendment Conference, Hofstra Law School, Jan. 19, 2007, New York, New York

The First Amendment and the Supreme Court: Annual Review of the First Amendment Decisions of the Supreme Court's October Term 2005, Annual Meeting of the Florida Bar, June 24, 2006, Boca Raton, Florida

University of Miami Law Review Symposium on Terri Schiavo, March 2006, Miami, Florida

The First Amendment and the Supreme Court: Annual Review of the First Amendment Decisions of the Supreme Court's October Term 2004, Annual Meeting of the Florida Bar, June 24, 2005, Orlando, Florida

The First Amendment and the Supreme Court: Annual Review of the First Amendment Decisions of the Supreme Court's October Term 2002, Annual Meeting of the Florida Bar, June 27, 2003, Orlando, Florida

Internet, the New Millennium and Entertainment, ESLS Spring Symposium on Entertainment and Sports Law, March 5, 2004, Miami, Florida

The Media in Times of War panel, ESLS Fifth Annual Symposium on Entertainment and Sports Law, April, 5, 2002, Miami, Florida

Regulation of Broadcasting, Film and Television Panel, ESLS Spring Symposium on Entertainment and Sports Law, March 2, 2001, Miami, Florida

Moderator, Coercing Privacy Panel, AALS Defamation & Privacy Section Extended Panel, Jan. 4, 2001, AALS Annual Meeting San Francisco

Interdisciplinary Conference on the Impact of Technological Change on the Creation, Dissemination, and Protection of Intellectual Property, February 10-12, 2000, The Ohio State University College of Law

Ownership and Content, Structural Media Issues and a Democratic Society, AALS Mass Communications Law Section, AALS Annual Meeting, January 8, 2000

## **ADMINISTRATIVE ACTIVITIES**

*Law School Committees:* Member, Chairs Committee (1993-2008); Chair, Promotion & Tenure Committee (2007); Appointments Committee (Member: 1987-88, 1995-96; Chair: 1999-2000); Curriculum Committee (Member: 1988-89; Secretary: 1989-90); Library Committee (Member: 1990-92; Chair: 1998-99); Student Life Committee (Chair: 1993); Dean Search Committee (1993) (2007-08); Promotion & Tenure Committee (Chair, 1994-95, 2000-01, 2007-08, Member: 2006-07); Admissions Committee (Member: 1996-97; Vice Chair); Chairs Committee (1996-99, 2000-02, 2003-08); Research & Publications Committee (Chair: 1997-98); Library Director Search Committee (1999); Community & Expectations of Faculty Committee (1999-2000); Career Services Committee (Chair: 2001-04); Space Advisory Committee (2001-2003); Disabilities Committee (2003-04); Faculty & Student Community & Career Services Committee (Chair: 2004-06); Academic Standards Committee (2004-09, Chair, 2006-07).

*University Committees:* Law School Dean Search Committee (2007-2009); Provost's Academic Personnel Board (2001); Provost Advisory Board on Women and Minorities (2000-2003); University Task Force on Women and Minority Faculty Recruitment (1999-2000); University Task Force on Facilities (1990-91).

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## **APPENDIX B**

**The attached Draft Article – A “Pay or Play” Experiment to Improve Children’s Educational Television – is currently in the editing process at the Federal Communications Law Journal and will be appearing in print in March 2010**

# A “PAY OR PLAY” EXPERIMENT TO IMPROVE CHILDREN’S EDUCATIONAL TELEVISION

Lili Levi\*

(Forthcoming FCLJ March 2010)

**Abstract:** This Article addresses both the constitutionality and the efficacy of the FCC’s current rules that require broadcasters to air children’s educational programming. It argues that, even though the rules would probably pass muster under the First Amendment, they should nevertheless be substantially revised. Empirical studies show mixed results, with substantial amounts of educationally insufficient programming. This is predictable – attributable to broadcaster incentives, limits on the FCC’s enforcement capacities, and audience factors. Instead, the Article advises a turn away from programming mandates. It proposes a “pay or play” approach that allows broadcasters to pay a fee to a fund for high-quality public television children’s programming, or to air such programming themselves, or to choose a combination of the two. The Article details some specific suggestions designed to limit both broadcaster game-playing and FCC content-intrusiveness under such a scheme. Ultimately, however, it calls for a ventilation of “pay or play” models in a public rulemaking proceeding. Such an inquiry might well result in a negotiated compromise. In time, its efficacy could be assessed by comparing the resulting programming to what was aired under the more traditional regulatory approach of the past decade.

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\* Professor of Law, University of Miami School of Law. Many thanks are due to Adam Candeub, Angela Campbell, Ken Casebeer, Mary Coombs, Michael Froomkin, Osamudia James, Pat Gudridge, Bernie Oxman, Steve Schnably and Ralph Shalom for conversations and comments, and to Amy Jordan for generous references to social science studies. Tim Westcott is owed special mention for help with empirical data. Grace Betz, Matthew Conrad, Jon Lewerenz, Michael Longo, Nick Mermiges and Luke Rossknecht provided excellent research assistance. This Article is dedicated to my daughter Nina, whose appreciation of *Sesame Street* inspired it. The errors are mine.

## *Introduction*

The issue of child welfare is again at center stage in media policy. On July 22, 2009, the Senate Commerce Committee held a hearing on “Rethinking the Children’s Television Act for a Digital Media Age.”<sup>7</sup> The original Children’s Television Act (CTA) – passed in 1990 – was designed to increase educational programming and reduce commercialization in children’s television.<sup>8</sup> The Committee now seeks to assess “[h]ow well the Children’s Television Act has worked, and how it can be updated to reflect the new digital media market.”<sup>9</sup> It is the Federal Communications Commission (“FCC or Commission”) that is charged with implementing the CTA, and the new Chairman of the agency responded to the Senate inquiry by announcing the commencement of a new FCC investigation into the rules adopted by the Commission pursuant to the original legislation.<sup>10</sup>

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<sup>7</sup> *Rethinking the Children’s Television Act for a Digital Media Age, Hearing before the S. Comm on Commerce, Science and Transportation*, 111th Cong. (July 22, 2009), available at [http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing\\_ID=caf69233-a0a4-4c94-8411-d51c651430b6](http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=caf69233-a0a4-4c94-8411-d51c651430b6). For the CSPAN video of the hearing, see C-SPAN Video Player - Senate Commerce Hearing on Children’s Television, July 22, 2009, <http://www.cspan.org/Watch/Media/2009/07/22/HP/A/21276/Senate+Commerce+Hearing+on+Rethinking+Childrens+Television.aspx> (last visited Aug. 11, 2009).

<sup>8</sup> Children’s Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000 (codified at 47 U.S.C. §§ 303a, 303b).

<sup>9</sup> *Rethinking the Children’s Television Act for a Digital Media Age, Hearing before the S. Comm on Commerce, Science and Transportation*, 111th Cong. (July 22, 2009) (Statement of Sen John D. Rockefeller IV, Chairman, S. Comm. on Commerce, Science and Transportation), available at [http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Statement&Statement\\_ID=4fe745c6-1c6e-4723-9d1c-3220f297fe5a](http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Statement&Statement_ID=4fe745c6-1c6e-4723-9d1c-3220f297fe5a).

<sup>10</sup> *Rethinking the Children’s Television Act for a Digital Media Age, Hearing before the S. Comm on Commerce, Science and Transportation*, 111th Cong. (July 22, 2009) (Statement of Julius Genachowski, Chairman, Fed. Communications Comm), available as prepared at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-292170A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-292170A1.pdf); See also John Eggerton, *FCC to Revisit Kids TV Rules*, BROAD. & CABLE ONLINE, (July 22, 2009), available at <http://www.broadcastingcable.com/article/316123-FCC+To+Revisit+Kids+TV+Rules.php?nid=2228&source=title&rid=6104711>.

The story begins in 1996, when the FCC, concluding that broadcasters had not taken the CTA seriously, adopted a processing guideline under which a broadcast station airing a minimum of three hours per week of core children’s educational or informational (E/I) programming as part of its public interest obligations would receive expedited, Staff-level license renewal review.<sup>11</sup> The Commission also defined core children’s E/I programming, for the first time, as regularly scheduled weekly programming of at least 30 minutes in length, aired between 7:00am and 10:00pm, and specifically designed to serve the educational and informational needs of children 16 years of age and younger.<sup>12</sup>

A decade later, in recognition of the fact that digital transmission would allow each broadcaster to multicast several programming streams, the Commission extended what had come to be known as the “three hour rule” to digital broadcasters – so that stations would air an additional, proportional amount of E/I programming on any free

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<sup>11</sup> The original 1996 FCC’s children’s educational television rules permitted stations that aired three hours of core children’s educational television programming per week to receive Staff-level review of their license renewal applications. 47 C.F.R. § 73.671(d); *See also* Policies and Rules Concerning Children’s Television Programming, 11 FCC Rcd. 10660 (1996) (“*1996 Children’s Television Rules*”). In 2004, the Commission extended the rules to digital content streams under a principle of proportionality. In the Matter of Children’s Television Obligations of Digital Television Broadcasters, 19 FCC Rcd. 22943 (2004) (“*2004 Children’s DTV Report and Order*”). The 2004 order required digital broadcasters to increase the amount of core programming broadcast, “roughly proportional” to the amount of additional free video programming (i.e., data-casting and subscription video services are not included) offered on multicast channels. The increase is tied to increments of 28 hours, i.e. a broadcaster who offered up to 28 hours of free video programming must show an additional 30 minutes of core programming, 29-56 hours would entail an additional 60 minutes of programming, and so on in increments of 28 hours. 2004 Children’s DTV Report and Order, *supra*, at ¶19. In 2006, the Commission revised and clarified some aspects of the rules, but the proportionality requirement was essentially unchanged. Second Order on Reconsideration and Second Report and Order, Children’s Television Obligations of Digital Television Broadcasters, 21 FCC Rcd. 11065 (2006) (*2006 Report & Order*).

<sup>12</sup> 47 C.F.R. § 73.671(c). To qualify as core E/I programming, a show must have serving the educational and informational needs of children 16 and under as a “significant purpose.” *Id.* at § 73.671(c)(1).

digital content streams they chose to transmit.<sup>13</sup> Throughout, the agency also limited the amount of commercial content that could be aired on children's programming.

Despite more than a decade since adoption of the original children's television regime, neither the effectiveness of the rules nor their constitutionality has been established. The empirical record as it stands is thin.<sup>14</sup> *Winx Club* has been claimed to be core educational programming. Legal scholars have not recently attempted to analyze the effectiveness of the Commission's approach in today's radically changed media market.<sup>15</sup> And because all the E/I television rules were adopted through Commission negotiation with broadcasters and children's advocates,<sup>16</sup> the rules were never subjected to judicial review.

This Article takes the opportunity recently offered by Congress and the FCC Chairman to assess the current regime and recommend policy changes. With respect to the constitutional question, the FCC's approach would be likely to pass First Amendment scrutiny. Although it is an important cliché of modern free speech doctrine that the

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<sup>13</sup> 47 C.F.R. § 73.671(e)(2).

<sup>14</sup> The last FCC analysis of E/I programming data was published in 1999, and the Commission has not yet released efficacy studies it promised in 2004. 2004 Children's DTV Report and Order, *supra* note 11, at 22966; FCC News Release, FCC Approves Transfer of Univision Communications Inc., 2007 FCC Lexis 2345, \*10 (2007) (Statement of Comm'r Jonathan S. Adelstein Approving in Part & Concurring in Part). *See also* FCC Public Notice, Commission Seeks Comment on the Status of Children's Television Programming, 22 F.C.C.R. 7267 (2007) (spring 2007 FCC public notice seeking comment on the status of children's television programming and compliance with the CTA). *See also* Section IIIA *infra*.

<sup>15</sup> Of course, in the early years, a scholarly literature developed in support of children's television rules. *See, e.g.,* Dale Kunkel and Julie Canepa, *Broadcasters' License Renewal Claims Regarding Children's Educational Programming*, 38 J. BROADCAST. & ELECT. MEDIA 4, 397 (1994); Dale Kunkel, *From A Raised Eyebrow To A Turned Back: The FCC And Children's Product-Related Programming*, 1988 J. OF COMM. 38, 90-108 (1988)

<sup>16</sup> *See* Section I, *infra*.



government cannot constitutionally compel speech,<sup>17</sup> broadcast regulation traditionally has been permitted more than the usual constitutional leeway,<sup>18</sup> children have received special protection, and the children’s educational television rules have been (and can be) structured to avoid formal compulsion.<sup>19</sup>

That it would likely be found doctrinally acceptable, however, does not resolve the question of whether the agency’s current approach to children’s educational television is desirable as a matter of media, social, or educational policy. The articulated regulatory justifications for the rules contain unrecognized and under-analyzed tensions. And questions arise if we frame the rules not as the FCC does – a socially beneficial attempt to improve public education and inculcate a common culture in today’s youth regardless of the incommensurability of their diverse local educational experiences – but as a virtually hidden federal educational initiative outsourced to a private sector primarily responsive to commercial incentives.

The empirical studies of children’s educational television since the adoption of the Commission’s rules disclose mixed results.<sup>20</sup> Although most broadcasters appear to

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<sup>17</sup> See, e.g., *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633 (1943); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Wooley v. Maynard*, 430 U.S. 705 (1977).

<sup>18</sup> See, e.g., *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978) (“[o]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection.”) See also Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101 (1993); Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. J.L. SCI. & TECH. 1 (2004); Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 95 GEO. L.J. 245 (2003).

<sup>19</sup> The Children’s Television Act only requires the FCC to “consider the extent to which the licensee has served the educational and informational needs of children through the licensee’s overall programming, including programming specifically designed to serve such needs.” 47 U.S.C. § 303b(a)(2). The Commission’s most recent implementation of the Act does not mandate quantitative minima. §§ 47 C.F.R. 73.671(b), (d), (e).

<sup>20</sup> See Section III.D, *infra*.

be formally complying with the FCC's rules, according to unofficial, non-FCC studies, the evidence shows a noteworthy decline in the amount of children's E/I programming and a consistent ghettoization of such programming to weekend mornings. Moreover, existing studies question the educational quality of a significant amount of the programming being broadcast over-the-air.

Three factors can explain these results: broadcasters' economic incentives; administrative limitations triggered by values in tension; and characteristics and preferences of both child audiences and their parents. Changes in the modern marketplace – the expansion of the global marketplace for programming to international outlets, the growing merchandising associated with at least some children's programming, and the transformation of children into a commodity-purchasing demographic for advertisers – have not eliminated the reality that children's educational programming is still largely unprofitable for broadcasters. The commercial, advertising-supported broadcast system will not on its own produce notable amounts of high-quality children's educational television programming.<sup>21</sup> Especially in light of the production expenses of high-quality E/I programming, and the FCC's limitations on advertising during children's television programming,<sup>22</sup> most E/I programming will not be self-supporting. Moreover, commercial broadcast programming is facing increasing competition from the array of educational offerings on PBS, cable and the Internet.<sup>23</sup>

Particularly as the declining status and profits of over-the-air television stations lead to an

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<sup>21</sup> S. Rep. No. 101-227 at 5-9 (1989) (making such findings in connection with the passage of the Children's Television Act).

<sup>22</sup> The FCC's limits on commercials aired during children's programming – 47 C. F. R. § 73.670 – were adopted pursuant to the Children's Television Act. 47 U.S.C. §§ 303a, 303b and 394.

<sup>23</sup> See, e.g., discussion at text accompanying notes 156, 197, 212 *infra*.

increasing concern with the bottom line,<sup>24</sup> some broadcasters will likely undermine the Commission's goals by steering too close to the entertainment line in their compliance with the E/I rules. Others will focus on the kinds of educational programming – such as “pro-social” rather than “cognitive” shows – that are more likely to generate greater commercial support.<sup>25</sup> Query whether this is the kind of programming that can best fill the gaps in public education noted by Congress and the FCC in justifying the Children's Television Act. These realities suggest that the Commission should rethink its commitment to the Sisyphean task of attempting to squeeze quality children's educational programming from entities whose commercial imperatives push in the opposite direction.<sup>26</sup> Regulating against the pressure of self-interest is unlikely to lead to first-best results. When good results occur, regulation is unlikely to be the principal cause.

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<sup>24</sup> See, e.g., Steve Green, *Ad Revenue Decline Puts Pressure on Broadcast Conference, Industry*, LAS VEGAS SUN, (Apr. 22, 2009), available at <http://www.lasvegassun.com/news/2009/apr/22/ad-revenue-decline-puts-pressure-broadcast-confere/>. See generally Thirteenth Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 24 F.C.C.R. 542 (Jan. 16, 2009) (FCC's report to Congress describing developments in the marketplace for the delivery of video programming). See also Judith C. Aarons, *Cross-Ownership's Last Stand? The Federal Communication Commission's Proposal Concerning the Repeal of The Newspaper/Broadcast Cross-Ownership Rule*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 317, 344 (2002) (noting decrease in market share of three broadcaster networks (ABC, NBC, CBS) from 95% to 61% between 1971 and 1995).

<sup>25</sup> See Barbara J. Wilson, Dale Kunkel & Kristin L. Drogos, *Educationally/Insufficient: An Analysis of the Availability & Educational Quality of Children's E/I Programming*, CHILDREN NOW (Nov. 2008), available at [http://publications.childrennow.org/publications/media/eireport\\_2008.htm](http://publications.childrennow.org/publications/media/eireport_2008.htm) (*Children Now Report*); Children's Media Policy Coalition, Comments on Notice of Proposed Rulemaking In the Matter of Status of Children's Television Programming, MM Docket No. 00-167 (Sept. 4, 2007), available at [http://fjallfoss.fcc.gov/cgi-bin/websql/prod/ecfs/comsrch\\_v2.hts?ws\\_mode=retrieve\\_list&id\\_proceeding=00-167&start=1&end=315&first\\_time=N](http://fjallfoss.fcc.gov/cgi-bin/websql/prod/ecfs/comsrch_v2.hts?ws_mode=retrieve_list&id_proceeding=00-167&start=1&end=315&first_time=N) (*Children's Media Policy Coalition Comments*).

<sup>26</sup> See, e.g., Adam Candeub, *Creating A More Child-Friendly Broadcast Media*, 3 MICH. STATE L. REV. 911 (2005); Robert Krotoszynski, *Into the Woods: Broadcasters, Bureaucrats and Children's Television Programming*, 45 DUKE L.J. 1193, 1242-43 (1996).

The anti-compliance pressure likely to be generated by broadcasters' economic incentives will in turn increase the FCC's transactions costs of tracking and assessing compliance. More problematically, the FCC's enforcement history in this area already reveals delay and enforcement limits best explained by regulatory ambivalence. Perhaps because of its concerns about trenching on broadcasters' expressive rights, and/or because of differences even in expert opinion about qualitative programming assessments, the Commission has not engaged in extensive, intensive, or timely enforcement of its children's programming rules. It has let slide claims that shows like *Saved By the Bell* satisfy E/I requirements, taken a leisurely approach to empirical study, and delayed for years the resolution of still-pending test claims of non-compliance.<sup>27</sup>

The final factor in this policy assessment is the preferences and viewing patterns of parents and children – the audience. Studies of audience behavior show that because children are largely destination viewers, and because parents' use of the television as babysitter requires some level of programming predictability, it will be very difficult for broadcasters to compete for children's attention with the niche children's programming

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<sup>27</sup> Children's Media Policy Coalition Comments, *supra* note 25, at 16-21 & nn. 67, 76 (citing the following unresolved petitions: Petitions to Deny Application of Renewal of Broadcast Station Licenses of Paxson Washington License, Inc. WPXW, Manassas, VA: File No. BRCT-20040527AGS; Fox Television Stations, Inc. WDCA, Washington, D.C.: File No. BRCT- 20040527AKL (filed Sept. 1, 2004); Petition to Deny Application of Renewal of Broadcast Station License of Raycom National, Inc. WUAB, Lorain, OH: File No. BRCT-20050527BIO (filed Aug. 31, 2005); Petition to Deny Application of Renewal of Broadcast Station License of Univision Cleveland LLC, Cleveland, Ohio: File No. BRCT-20050601BER (filed Aug. 31, 2005)).

The agency's highly publicized \$24 million consent decree with Univision in 2007 over its stations' failure to air core children's programming is not to the contrary. In the Matter of Shareholders of Univision Communications Inc. (Transferor) and Broadcasting Media Partners, Inc. (Transferee), Memorandum Opinion and Order, FCC 07-24, ¶¶ 40-42, 2007 WL 924014, 22 F.C.C.R. 5842 (2007) (entering into a Consent Decree with Univision, as part of Univision's transfer of multiple broadcast licenses, to resolve petitions to deny grounded on Univision's asserted failure to comply with children's educational programming requirements.)

channels on cable.<sup>28</sup> Moreover, the evidence shows that many parents are not aware of the FCC's E/I rules and do not understand the E/I notifications provided to guide their viewing choices.<sup>29</sup> This is exacerbated by the reality that most television guides today do not publish the relevant information even if broadcasters provide it.<sup>30</sup>

Airtime programming decisions are a zero sum game. If all broadcasters in a market have to provide children's educational programming on all their free program streams, they will be displacing some other kind of content that might otherwise air. The question then is whether a regulatory policy that creates significant incentives for the airing of such programming – even when the audience for it is already largely wedded to cable and public television – is unduly displacing the development of other, potentially less available, programming on the broadcast medium. For example, serious journalism – and particularly investigative journalism – is expensive and increasingly under-produced in today's media marketplace.<sup>31</sup> I have argued elsewhere that today's media shows a striking need for an expanded commitment to serious journalism.<sup>32</sup> Yet media

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<sup>28</sup> See discussion *infra* at Section III.E.3.

<sup>29</sup> Children's Media Policy Coalition, Comments on Notice of Proposed Rulemaking In the Matter of Status of Children's Television Programming, MM Docket No. 00-167 (Sept. 4, 2007), available at [http://fjallfoss.fcc.gov/cgi-bin/websql/prod/ecfs/comsrch\\_v2.hts?ws\\_mode=retrieve\\_list&id\\_proceeding=00-167&start=1&end=315&first\\_time=N](http://fjallfoss.fcc.gov/cgi-bin/websql/prod/ecfs/comsrch_v2.hts?ws_mode=retrieve_list&id_proceeding=00-167&start=1&end=315&first_time=N); Section III.E.3, *infra*.

<sup>30</sup> Children's Media Policy Coalition Comments, *supra* note 25, at 9 (“[w]hile FCC rules require broadcasters to provide program guide publishers with core program information, including target ages, we are currently unaware of any program guides that regularly provide such information. The Coalition is also unaware of any cable system operators who provide E/I program information on their digital program guides.”)

<sup>31</sup> See generally Lili Levi, *In Search of Regulatory Equilibrium*, 35 HOFSTRA L.REV. 1321(2007).

<sup>32</sup> See, e.g., See, e.g., David Lieberman, *Newspaper Closings Raise Fears About Industry*, USA TODAY (Mar. 19, 2009), available at <http://www.usatoday.com/money/media/2009-03-17-newspapers->

policy discourse has not considered whether at this point in newspaper history, incentives to serious journalism in electronic media should take precedence over commitments to market-wide children's E/I programming obligations for every commercial broadcast television station – particularly in light of cable offerings on Nickelodeon and the questionable efficacy of the current rules to deliver high quality children's content.

This skepticism about the Commission's E/I rules in practice does not mean, however, that we should not explore other potentially effective ways of promoting quality children's educational programming. We know that excellent children's educational shows such as *Sesame Street* have been consistently generated by public television.<sup>33</sup> Such offerings would likely be enhanced if public stations were given appropriate additional funding. Yet the traditional approach of appealing to Congress for government funding has been an abject failure with respect to E/I programs – as demonstrated by the short and sad history of the National Endowment for Children's Educational Television.<sup>34</sup>

This Article proposes that the Commission evaluate various possible alternative children television rules by testing the degree to which they are likely to accomplish five objectives: promoting quality programming, increasing the amount of children's E/I

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[downturn\\_N.htm](#) (describing closing of numerous daily papers, including Rocky Mountain News, Tucson Citizen, Seattle Post-Intelligencer; and 9.7% drop in ad revenue for newspapers in 2009)

<sup>33</sup> See generally PBS KIDS, Everything, <http://pbskids.org/everything.html> (last visited Aug. 11, 2009). See also Press Release, PBS Kids is the #1 Educational Media Brand According to National Roper Survey (June 24, 2009), available at [http://www.iptv.org/iptv\\_news\\_detail.cfm?id=4286&type=press\\_release](http://www.iptv.org/iptv_news_detail.cfm?id=4286&type=press_release) (describing GfK Roper survey's conclusion that PBS Kids is the top brand in children's educational programming, beating both cable and commercial offerings.)

<sup>34</sup> Congress established a National Endowment for Children's Educational Television in association with the Children's Television Act. 47 U.S.C. § 394. The endowment was only funded from 1993-1995, and even then for less than \$ 3 million per year. See 1995 NECET Notice of Availability of Funds, National Endowment for Children's Educational Television <http://www.ntia.doc.gov/otiahome/necet/necetrfp.html> (last visited Aug 11, 2009).

programming in a manner responsive to market needs for various types of such programming, providing sufficient flexibility for broadcasters to enhance innovation over time, ensuring administrability by the FCC, and empowering parents informationally.

Consideration of those factors suggests that an alternative “pay an E/I fee-or-play” model for promoting high quality children’s E/I programming be explored in lieu of the current “three hour rule” model.<sup>35</sup> The alternative approach would have two prongs. Under the first, broadcasters would be required to contribute a children’s E/I programming fee yearly to an E/I fund. The collected fees would be disbursed, preferably by an independent manager of the E/I fund, to promote high-quality public television E/I programming. The independent manager of the E/I fund would also be responsible for spearheading the kind of media literacy that would enable intelligent viewing choices.

Pursuant to the second prong, broadcasters who wished to reduce or eliminate their fee obligations could instead choose to air their own children’s E/I programming. A sliding scale model would enhance flexibility. However, in order to justify a fee exemption or reduction, the broadcaster would be precluded from segregating all its E/I programming to weekend mornings, and its programming would have to be rated highly in comparison to other children’s E/I programming by nationally-recognized, independent rating agencies. In turn, the work of those ratings agencies would be publicized, *inter alia*, on the FCC’s website, and funded through a ratings fee contributed to a rating fund. The broadcaster would receive increasing amounts of credit against its

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<sup>35</sup> The proposal is not a simple pay-or-play system, under which, for example, broadcasters would be given the choice of either airing children’s E/I programming as under the current rules, or funding other stations’ airing of such shows. Nevertheless, the proposal is informed by a sensibility that seeks to provide as much bounded flexibility as possible for broadcasters.

tax obligation in the degree that its own children's E/I programming met needs otherwise underserved in the local market. In other words, if – as children's advocates complain – there is too much social rather than cognitive educational programming for certain age ranges in a broadcaster's market,<sup>36</sup> then a broadcaster's airing of a high quality cognitive E/I show for an underserved child population could warrant the highest level of exemption from its E/I fee obligations. Of course, it is important that the proposed approach be structured to minimize valuation problems and complexity, and permit appropriate monitoring.

What can we expect if alternative proposed here were adopted? Some broadcasters, such as ABC stations, would likely continue to air some good quality E/I programming because ABC's ownership of Disney provides them a ready supply of product. They would be excused from their E/I fee if and to the extent that their offerings met the quality ratings requirements. Other broadcasters might air children's E/I programming as part of an experiment with niche programming on some of their digital program streams now that the broadcast digital transition has taken place. Indeed, some broadcasters have already partnered to launch the Qubo 24-hour per day children's broadcast television channel.<sup>37</sup> Still other broadcasters – perhaps the majority – would

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<sup>36</sup> See Section III.D *infra*.

<sup>37</sup> See *Rethinking the Children's Television Act for a Digital Media Age*, Hearing before the S. Comm on Commerce, Science and Transportation, 111th Cong. (July 22, 2009) (Testimony of John Lawson, ION Media Networks), available at [http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing\\_ID=caf69233-a0a4-4c94-8411-d51c651430b6&Witness\\_ID=cc5e317a-98b8-4eaf-b714-f7e4a88f6d51](http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=caf69233-a0a4-4c94-8411-d51c651430b6&Witness_ID=cc5e317a-98b8-4eaf-b714-f7e4a88f6d51). See also qubo Channel, <http://www.qubo.com/channel/> (last accessed Aug. 11, 2009). Qubo is a partnership of NBC, ION Media Networks, Scholastic Media, Classic Media and Corus Entertainment. National Association of Broadcasters, Comments on Notice of Proposed Rulemaking In the Matter of Status of Children's Television Programming, MM Docket No. 00-167 at 4-5 (Sept. 4, 2007), available at [http://fjallfoss.fcc.gov/cgi-bin/websql/prod/ecfs/comsrch\\_v2.hts?ws\\_mode=retrieve\\_list&id\\_proceeding=00-167&start=11&end=20&first\\_time=N](http://fjallfoss.fcc.gov/cgi-bin/websql/prod/ecfs/comsrch_v2.hts?ws_mode=retrieve_list&id_proceeding=00-167&start=11&end=20&first_time=N) (NAB Comments).



likely opt to fund PBS programming by contributing the E/I fee to the children's educational television fund. If so, there might be sufficient funds for separate public children's channels to result.

There are of course various ways of designing workable "pay-or-play" or "tax-and-exemption" regimes. This Article suggests that it is time for the FCC itself to think creatively in seeking public reaction to innovative pay-or-play-influenced policies as alternatives to its current direct regulation. Sponsorship of children's E/I programming is permitted under the 1990 CTA<sup>38</sup> and to some degree under the Commission's rules, have been rejected without any sustained analysis by the Commission. Serious public inquiry moderated by the Commission would be useful in two ways. First, and obviously, it could generate a full exploration of the possible flexible models (including the version proposed here) from all points of view. In doing so, however, it could also create an opportunity for the kind of negotiated media policy that has marked the FCC's approach toward children's educational programming requirements since 1996.

In the final analysis, the current FCC children's television rules are not bad media policy. After all, such empirical data as we have reflects that most broadcasters are complying with the letter of the Commission's rules. Evidence from the decline of E/I programming in the 1980s suggests that the rules may have generated some better children's educational programming on commercial over-the-air television than would

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<sup>38</sup> The Children's Television Act provides that during review for license renewal, "the Commission may consider . . . any special efforts by the licensee to produce or support programming broadcast by another station in the licensee's marketplace which is specifically designed to serve the educational and informational needs of children." 47 U.S.C. § 303(b)(2). The FCC's regulation reflects this. *See also* 47 Code Fed. Reg. 73.671 (stating that supporting other stations' E/I programming "may also contribute to meeting the licensee's obligation.") *See also infra* note 230.

have been the case otherwise.<sup>39</sup> They might even have displaced some of the poor – violent, badly produced, and anti-social – children’s entertainment programming that would otherwise have aired. But the final assessment requires us to ask both whether the benefits outweigh the costs, and whether alternatives might not better promote at least some of the goals for which the original rules were designed.<sup>40</sup> This Article argues that an experiment with a realistic “play-or-pay an E/I fee” alternative would provide the evidence to make that assessment.

Section I of this Article describes the history of children’s educational television regulation. Section II addresses the constitutional question, suggesting that despite contrary undercurrents, current First Amendment doctrine would likely support the Commission’s discretion to adopt the children’s educational television rules as drafted. Section III then looks at the effectiveness of the Commission’s rules, with III.A, B, and C addressing the tensions in the Commission’s articulated goals, the rules as national education policy, and the impact of regulatory scarcity. Section III.D describes the empirical studies in the area. Having reported the mixed empirical results, Section III.E then attempts to explicate the outcomes by reference to three characteristics: 1) broadcasters’ economic incentives in light of current market conditions, 2) administrative enforcement limitations, and 3) audience factors. The Article concludes in Section IV that the children’s educational television rules do not constitute particularly beneficial

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<sup>39</sup> See Children’s Media Coalition Policy Coalition Comments, *supra* note 25, at 4 (comparing today’s findings that broadcasters air an average of three hours per week of core educational programming with the NAB’s claim in 1996 that they were airing an average of two hours per week prior to passage of the CTA, and citing the *1996 Order*, 11 FCC Rcd at 10719.)

<sup>40</sup> Krotoszynski, *Into the Woods*, *supra* note 26, at 1242-1243.

media policy. Instead, it suggests that a different approach be taken to the generation of high quality children's educational programming – one focusing not on programming obligations for private commercial broadcasters, but rather on funding public production of such programming through a children's education programming funding system which could subsidize additional PBS children's E/I programming – but which could be avoided by broadcasters through their own high quality E/I efforts, if they choose to make them.

### ***I. The History of the FCC's Children's Educational Television Rules:***

The Commission has been attempting to encourage broadcasters to air quality children's educational television for almost 50 years. It explicitly began its efforts to promote children's programming in 1960, when it identified children as one of the groups whose programming needs must be met by broadcasters in order to fulfill their public trustee obligations.<sup>41</sup> For much of the time thereafter, however, the agency focused on commercialization policies for advertising in children's programming and relied on the industry to self-regulate with regard to programming.<sup>42</sup> To prompt such self-regulation, the Commission delivered hortatory statements about the benefits of children's programming, explaining, for example, that broadcasters have a “special obligation” to

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<sup>41</sup> Report and Statement of Policy Re: Commission En Banc Programming Inquiry, 44 F.C.C. 2303 (1960) (*En Banc Programming Inquiry*). For the FCC's accounts of the history of children's television regulation, see, e.g., 2004 Children's DTV Report & Order, *supra* note 11, at 22945-22949.

<sup>42</sup> For histories of the Commission's approach to children's television, see, e.g., NEWTON N. MINOW & CRAIG L. LAMAY, ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT (1995); Angela J. Campbell, *Lessons From Oz: Quantitative Guidelines for Children's Educational Television*, 20 COMM/ENT L.J. 119, (1997); James J. Popham, *Passion, Politics and the Public Interest: The Perilous Path to a Quantitative Standard in the Regulation of Children's Television Programming*, 5 COMMLAW CONCEPTS 1 (1997).

serve children, and suggesting that licensees “make a meaningful effort” to increase the number of programs targeted to children in various age groups.<sup>43</sup>

Despite such exhortations, however, broadcasters of the 1970s and later decades – unlike those of the 1950s – did not air much educational programming for children.<sup>44</sup> Children’s advocacy groups responded by attempting to convince the Commission to replace exhortations (and broadcaster laissez-faire) with mandatory children’s television requirements.<sup>45</sup> After President Carter took office, a Children’s Task Force established by the FCC in 1977 concluded that broadcasters had not adequately complied with the Commission’s prior recommendations and urged mandatory programming requirements.<sup>46</sup> Despite these calls from both inside and outside the Commission, the

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<sup>43</sup> Children’s Television Report and Policy Statement, 50 F.C.C.2d 1, ¶¶ 15, 20, 22 (1974), *aff’d*, Action for Children’s Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977) (1974 Policy Statement). The Commission also focused on children’s particular vulnerability to commercial messages. *Id.* See also Children’s TV NPRM, 10 FCC Rcd. 6308 (1995) at ¶ 3 (describing FCC’s action).

<sup>44</sup> Broadcasters had programmed extensively and diversely for children in the 1950s – principally to promote the purchase of television sets (which were still new and expensive consumer appliances at the time.) MINOW & LAMAY, *supra* note 42, at 41-42, 45; Alison Alexander, *Broadcast Networks and the Children’s Television Business*, in HANDBOOK OF CHILDREN AND THE MEDIA 495, 496 (Dorothy G. Singer & Jerome L. Singer, eds. 2001). In the early days of television, children’s educational programs “were part of standard commercial offerings.” Aletha C. Huston & John C. Wright, *Television and the Informational Needs of Children*, 557 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 9, 10 (1998) (“The number of such programs peaked in 1953, dropped precipitously by 1959, increased some in the 1960s, and steadily declined after that time until the early 1990s.”) See also NORMA ODOM PECORA, THE BUSINESS OF CHILDREN’S ENTERTAINMENT 30-32 (1998). When multiple television sets became common, however, broadcasters apparently saw no need to continue that high level of children’s programming. They segregated children’s programming to Saturday mornings, when stations assumed the adult audience would not be watching. Children’s programming consisted largely of cartoons, with few – although notable – educational programs (such as Captain Kangaroo). MINOW & LAMAY, *supra* note 42, at 41, 45.

<sup>45</sup> For example, Action for Children’s Television submitted a petition proposing that the Commission adopt minimum amounts of age-specific programming for children. See, e.g., In re Petition of Action for Children’s Television (ACT) for Rulemaking Looking Toward the Elimination of Sponsorship and Commercial Content in Children’s Programming and the Establishment of a Weekly 14 Hour Quota of Children’s Television Programs, Notice of Inquiry and Notice of Proposed Rule Making, 28 F.C.C. 2d 368, 368-69 (1971). See also 1974 Policy Statement, *supra* note 43.

<sup>46</sup> FCC, TELEVISION PROGRAMMING FOR CHILDREN, A REPORT OF THE CHILDREN’S TASK FORCE (1979) (1979 Task Force Report). See also Notice of Proposed Rulemaking, Children’s Television

agency thereafter explicitly rejected mandatory children's programming minima during President Reagan's first term.<sup>47</sup> The Commission thereby adopted a marketplace-oriented approach to children's television.<sup>48</sup> At this point, in the 1980s, even the agency's hortatory statements about programming for children became less specific and less directive.<sup>49</sup> This occurred just as the development of extensive renewal expectancies presumably reduced the constraining effect on broadcaster behavior of the fear of license non-renewal.

Again the children's advocacy community responded, this time by lobbying Congress, which passed the Children's Television Act of 1990 (CTA or Act).<sup>50</sup> The Act

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Programming and Advertising Practices, 75 FCC2d 138 ¶ 4 (1979)(addressing the possibility of mandated programming requirements.)

<sup>47</sup> 1974 Policy Statement, *supra* note 43; Report and Order, Children's Television Programming and Advertising Practices, MM Docket No. 19142, 96 F.C.C.2d 634 (1984), *aff'd*, Action for Children's Television v. FCC, 756 F.2d 899 (D.C. Cir. 1985)(1984 Report & Order)(rejecting the FCC Task Force Report's recommendation).

<sup>48</sup> The Commission's 1984 Report & Order recommended increased public funding of children's television and the creation of additional video outlets so that the market would lead to an appropriate supply of children's educational programming. The agency also defined the relevant market for children's programming more broadly than broadcasting alone. *Id.* In addition, the Commission during this period also repealed its previous commercialization guidelines limiting commercials during children's educational programming. See Report and Order, Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Logs for Commercial Television Stations, 98 F.C.C.2d 1076 (1984).

<sup>49</sup> Indeed, then-Commissioner Rivera, in dissent in the Commission's 1984 Report & Order relying on the market, characterized the agency as in fact repealing its prior approach to children's educational programming in exchange for complete capitulation to the market. Report and Order, Children's Television Programming and Advertising Practices, MM Docket No. 19142, 96 F.C.C.2d 634 (1984), *aff'd*, Action for Children's Television v. FCC, 756 F.2d 899 (D.C. Cir. 1985) (Comm'r Rivera, dissenting). Calling the Commission's action a "funeral" for children's television, Commissioner Rivera characterized the 1984 decision as eliminating all the specificity of the FCC's prior attempts to inject content into its self-regulatory exhortations. *Id.*

<sup>50</sup> Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b, 394. See Popham, *supra* note 42, at 7 (describing process). According to a Commission history, the Senate report on the CTA cited the Commission's 1984 decisions as "precipitating factors" in the enactment of the legislation. Notice of Proposed Rulemaking, Children's Television Obligations of Digital Television Broadcasters, 15 F.C.C. Rcd. 22946 at n. 15 (2000) (2000 Children's Digital TV NPRM). For a history of the adoption of the CTA, see Dale Kunkel, *Policy Battles Over*

imposed two requirements for children's programming. First, it required broadcast licensees and cable operators to limit the amount of commercial matter on children's programs.<sup>51</sup> Second, the Act required the Commission to consider whether broadcasters had served "the educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs."<sup>52</sup> The FCC issued a report implementing the Act in 1991.<sup>53</sup> Nevertheless, because the CTA did not contain any specific programming requirements, the Commission initially continued to rely on a self-governance approach even in response to that directive in the Children's Television Act.<sup>54</sup>

At least some broadcasters did not take the FCC's *1991 Order* seriously and claimed that shows like "The Jetsons", "GI Joe" and "Teenage Mutant Ninja Turtles"

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*Defining Children's Television*, 557 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL & SOCIAL SCIENCE 39 (1998).

<sup>51</sup> The Act limited commercials during children's programming to 10.5 minutes per hour during weekends and 12 minutes per hour on weekdays. See 47 U.S.C. §§ 303(a), 303(b). The FCC also counts as a program-length commercial "a program associated with a product, in which commercials for that product are aired." Children's Television Programming, 6 FCC Rcd 2111, 2118 (1991). Host-selling – "the use of program talent to deliver commercials" is also prohibited by the Commission's rules. *Id.* at 2127 n. 147; see also Action for Children's Television, 50 FCC 2d 1, 8, 14-17 (1974).

<sup>52</sup> 47 U.S.C. §§ 303(b). See also 2000 Children's Digital TV NPRM, *supra* note 50, at ¶ 5.

<sup>53</sup> Policies and Rules Concerning Children's Television Programming, 6 FCC Rcd. 2111, 2112 (1991) ("*1991 Report & Order*"), recon. granted in part, 6 FCC Rcd. 5093 (1991).

<sup>54</sup> 1991 Report & Order, *supra* note 53. Largely focusing on policies regarding advertising in children's television programming, the Report advised broadcasters that the Commission would consider (during the renewal process) whether they had "served the educational and information needs of children." *Id.* See also In the Matter of Children's Television Obligations of Digital Broadcasters, Report & Order and Further Notice of Proposed Rulemaking, 2004 WL 2674338, 19 F.C.C.R. 22,943, 22,947 ¶ 9 (2004)(describing the Commission's 1991 rules as follows: "[t]hese rules included a flexible definition of educational programming, did not establish quantitative guidelines regarding the amount of educational programming licensees were required to provide, and did not include measures designed to inform the public about educational programming.").

satisfied their obligations to air children's educational programming.<sup>55</sup> Apparently, the market's response to the FCC's reliance on industry self-regulation was to decrease the amount of children's educational programming aired by broadcasters over time and to increase advertising in such programming.<sup>56</sup>

In 1996, concluding that its initial regulations implementing the CTA had not been "fully effective[.]"<sup>57</sup> the Commission radically shifted its approach away from general calls for voluntary industry attention to children. It chose an approach with three significant new elements: Notably, it adopted processing guidelines for renewal applications under which a broadcaster could receive expedited, Staff-level approval of the CTA portion of its renewal application by airing at least three hours per week of core educational programming.<sup>58</sup> Nevertheless, even if a broadcaster did not satisfy the "three hour rule", it could still be referred for hearing to the whole Commission and have its

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<sup>55</sup> Popham, *supra* note 42, at 10 (describing Congressman's statement). See also MINOW & LAMAY, *supra* note 42, at 10-11; Amy B. Jordan, *The Three-Hour Rule and Educational Television for Children*, 2(2) POPULAR COMMUNICATION 103 (2004) (Jordan 2004); Kunkel, *Policy Battles*, *supra* note 50, at 44-5 (describing "creative relabeling" of programs); Dale Kunkel & Ursula Goette, *Broadcasters' Response to the Children's Television Act*, 2 COMM. L. & POL'Y 289 (1997).

<sup>56</sup> 2000 Children's Digital TV NPRM, *supra* note 50, at ¶ 4.

<sup>57</sup> 1996 Children's Television Rules, *supra* note 11, at ¶ 2.

<sup>58</sup> *Id.* at ¶¶ 6, 131.

Expedited, Staff-level review would also be available to broadcasters who, although they provided somewhat less than three hours per week of core programming, aired package of programming "that demonstrates a level of commitments to educating and informing children that is at least equivalent to airing three hours per week of core programming." 1996 Children's Television Rules, *supra* note 11, at ¶¶ 5, 133. (Specifically, the Commission described its processing guideline as consisting of category A, category B, and Commission consideration. *Id.* at ¶ 131-135. The broadcaster seeking to secure staff approval under such "category B" review "must show that any reasonable observer would recognize commitments to educating and informing children to be at least equivalent of a commitment reflected in category A." *Id.* at ¶ 133. Category B showings might include specials, regularly scheduled modern weekly programs, short form programs, and PSAs with a significant purpose of educating and informing children. Other relevant factors showing commitments would be airing children's educational programming during prime time or investing a substantial amount of money in developing core programming aired on the broadcaster's channel. *Id.* at ¶ 133.)

license renewed if it convinced the full Commission that it had met its CTA obligation in other ways.<sup>59</sup> It could do so under what might be called a pay-or-play option -- pursuant to which it sponsored core children's educational programming on other stations in the market.<sup>60</sup>

In addition to the "three hour rule," the 1996 FCC also for the first time provided a definition of "core" children's educational programming as programming "specifically designed" to educate and inform children -- "regularly scheduled weekly programming of at least 30 minutes duration, aired between 7:00am and 10:00pm, that has serving the educational and informational needs of children ages 16 and under as a significant purpose."<sup>61</sup>

Finally, in attempts to improve public access to information about programming specifically designed for children, it required broadcasters to identify core programming when aired and to publicize such programming.<sup>62</sup> Providing such information would not

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<sup>59</sup> 1996 Children's Television Rules, *supra* note 11, at ¶ 6.

<sup>60</sup> For example, broadcasters would have a full opportunity to make this demonstration by relying in part on sponsorship of core educational and informational programs on other stations in the market (thereby increasing the amount of core educational and informational programming on the station airing the sponsored program) and/or on special non-broadcast efforts which enhance the value of children's educational and informational television programming." *Id.*

<sup>61</sup> 47 C.F.R. § 73.671(c). *See also* 1996 Children's Television Rules, *supra* note 11, at ¶¶ 4, 76, 79-112; 2004 Children's DTV Report and Order, *supra* note 11, at ¶ 11. The Commission explained that although "[e]ducation need not be the only purpose of programming specifically designed to meet the educational and informational needs of children, [it] must be more than an incidental goal." *Id.* at ¶ 194. It did not draw distinctions between educational and informational programming that furthers children's cognitive and social development. *See Jordan 2004, supra* note 55, at 104-5; Kunkel, *Policy Battles, supra* note 50. (describing the expansion of the definition to include social as well as cognitive lessons as resulting from broadcaster lobbying.) Nor did the Commission require licensees to use educational consultants or advisors to help with the production of core children's educational programming. 1996 Children's Television Rules, *supra* note 11, at ¶ 89.

<sup>62</sup> 1996 Children's Television Rules, *supra* note 11, at ¶ 49. *See also* 47 C.F.R. §§ 73.3526(a)(11)(iii), 73.673. Under these informational initiatives, the 1996 rules required commercial broadcasters to identify core programming when aired by displaying an "E/I" icon, identify such programs to publishers of program guides; and provide improved access to information to the public through



only help parents direct their children's television viewing more accurately, but also would "permit[] the Commission to rely more on marketplace forces to achieve the goals of the CTA, and facilitates enforcement of the statute by allowing parents, educators, and others to actively monitor station's performance."<sup>63</sup>

How did this turn-about occur? As one commentator has characterized it, the rules were a result of "raw political compromise."<sup>64</sup> In 1993, after President Clinton's election, the Commission had issued a new Notice of Inquiry on the question of children's television.<sup>65</sup> Congress and the White House pressured the agency to quantify children's educational programming requirements, but the issue was highly contentious among the Commissioners.<sup>66</sup> The 1996 children's television processing guidelines enforcing the CTA were finally generated as a result of last minute negotiations between industry leaders and the White House immediately prior to a scheduled White House

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standardized reporting and other means. 1996 Children's Television Rules, *supra* note 11, at ¶ 49, 65. 47 C.F.R. § 73.673. The information provided should contain identification of core programs and the age group for which the program was intended, in the view of the broadcaster. 1996 Children's Television Rules, *supra* note 11, at ¶ 57. FCC Consumer Facts: Children's Educational Television, <http://www.fcc.gov/cgb/consumerfacts/childtv.html>

<sup>63</sup> 1996 Children's Television Rules, *supra* note 11, at ¶ 3. The Commission thought this information initiative would "increase the likelihood that the market will respond with more educational programming" and "help parents and others have an effective dialogue with broadcasters in their community about children's programming and, where appropriate, to urge programming improvements without resorting to government intervention." *Id.* at ¶ 47. FCC News Release, *FCC Chairman Reed Hundt Encourages Parents and Activists to Watch, Critique, and Report on New Kids Shows* (Sept. 18, 1997), available at [www.fcc.gov/Bureaus/Miscellaneous/News\\_Releases/1997/nrmc7068.html](http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/1997/nrmc7068.html).

<sup>64</sup> Popham, *supra* note 42. See also Campbell, *supra* note 42.

<sup>65</sup> In re Policies and Rules Concerning Children's Television Programming, Notice of Inquiry, 8 F.C.C.R. 1841, ¶ 1 (1993). See also Kunkel, *Policy Battles*, *supra* note 50, at 45 (suggesting political basis of FCC's change).

<sup>66</sup> Popham, *supra* note 42, at 8-9.

summit on children's television policy.<sup>67</sup> The guidelines were never subjected to judicial review.

Four years later, the FCC commenced a proceeding to address children's television obligations of digital television broadcasters in light of television's impending digital future.<sup>68</sup> It concluded that digital broadcasters would be subject to all the CTA commercial time limits and educational and information programming requirements previously applied to analog broadcasters.<sup>69</sup> After significant delay, the Commission finally extended its children's educational television rules to broadcasters airing digital programming in 2004.<sup>70</sup> It adopted an approach pursuant to which broadcasters choosing

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<sup>67</sup> 1996 Children's Television Rules, *supra* note 11. *See also* Popham, *supra* note 42, at 9-16 (describing the conflicts and stalemates among the Commissioners and the White House-brokered negotiated compromise with the broadcast industry); Kunkel, *Policy Battles*, *supra* note 50, at 47-48.

<sup>68</sup> 2000 Children's Digital TV NPRM, *supra* note 50, at ¶ 15 (requesting comment on application of the three-hour children's E/I guideline to DTV broadcasters). Chairman Kennard – a Clinton appointee – characterized the proceeding as an inquiry into how broadcasters would satisfy their public interest obligations in exchange for the \$70 billion dollar “giveaway” of digital spectrum. William E. Kennard, “What Does \$70 Billion Buy You Anyway? Rethinking Public Interest Requirements at the Dawn of the Digital Age,” Remarks before the Museum of Television and Radio, New York, New York (Oct. 10, 2000), available at [www.fcc.gov/Speeches/Kennard/2000/spwek023.html](http://www.fcc.gov/Speeches/Kennard/2000/spwek023.html). *See also* William E. Kennard, REPORT TO CONGRESS ON THE PUBLIC INTEREST OBLIGATIONS OF TELEVISION BROADCASTERS AS THEY TRANSITION TO DIGITAL TELEVISION 2 (Jan. 18, 2001), at [www.fcc.gov/Speeches/Kennard/Statements/2001/stwek106.pdf](http://www.fcc.gov/Speeches/Kennard/Statements/2001/stwek106.pdf). The Commission sought further comment in 2003. Notice of Proposed Rulemaking, Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, 18 FCC Rcd. 1279 (2003) (*Second Periodic Review*). It finally adopted an order extending the rules in September 2004, released in November 2004. *See* 2004 Children's DTV Report and Order, *supra* note 11, at 13. *See also* In the Matter of Public Interest Obligations of TV Broadcast Licensees, 14 F.C.C.R. 21,633 (1999) (opening a more general proceeding to determine the public interest obligations of broadcasters in the transition to digital television). This inquiry drew on the work of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters (also known as the “Gore Commission”). *See* CHARTING THE DIGITAL BROADCASTING FUTURE: FINAL REPORT OF THE ADVISORY COMMITTEE ON PUBLIC INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS (December 1998) (*Gore Commission Report*).

<sup>69</sup> *See, e.g.*, 2004 Children's DTV Report and Order, *supra* note 11, at 22951 ¶ 12.

<sup>70</sup> 47 C.F.R. §§ 73.671(e). Chairman Kennard was followed in 2001 by the appointment as Chairman of Republican Michael Powell, who expressed doubt about the rules. 2000 Digital Children's TV NPRM, *supra* note 50, at 22972 (separate statement of Comm'r Michael Powell). *See also* Report and Order, MM Docket No. 99-360, 14 FCCR 21633, 21658 (1999)(Powell concurring)(questioning “why the mere use of a digital medium rather than an analog one justifies new public interest obligations.”) The

to provide additional channels or hours of free video programming in addition to their required free over-the-air video program service would have an “increased core programming benchmark roughly proportional to the additional amount of free programming they choose to provide.”<sup>71</sup> In 2006, following an additional rulemaking inquiry,<sup>72</sup> the Commission adopted the recommendations of a Joint Proposal (submitted by various broadcast and cable interests and children’s advocacy groups)<sup>73</sup> to modify the 2004 rules.<sup>74</sup> Again as a result of the negotiated agreement, the broadcasters withdrew their challenges to the digital children’s television rules.<sup>75</sup>

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Commission explicitly revived its moribund inquiries only after two years, in its periodic review of the Commission’s rules affecting the conversion to digital television in 2003.

<sup>71</sup> 2004 Children’s DTV Report and Order, *supra* note 11, at 22950-22951 ¶ 19 (“Digital broadcasters will continue to be subject to the existing three hours per week core programming processing guideline on their main program stream. DTV broadcasters that choose to provide additional streams or channels of free video programming will, in addition, have the following guideline applied to the additional programming: 1/2 hour per week of additional core programming for every increment of 1 to 28 hours of free video programming provided in addition to the main program stream. Thus, digital broadcasters providing between 1 and 28 hours per week of free video programming in addition to their main program stream will have a guideline of 1/2 hour per week of core programming in addition to the 3 hours per week on the main program stream. Digital broadcasters providing between 29 and 56 hours per week of free video programming in addition to their main program stream will have a guideline of 1 hour per week of core programming in addition to the 3 hours per week on the main program stream. Digital broadcasters providing between 57 and 84 hours per week of free video programming in addition to their main program stream will have a guideline of 1 1/2 hours per week of core programming in addition to the 3 hours per week on the main program stream. The guideline will continue to increase in this manner for additional hours of free video programming.”)

<sup>72</sup> Second Further Notice of Proposed Rulemaking, In the Matter of Children’s Television Obligations of Digital Television Broadcasters, 21 FCC Rcd. 3642 (2006) (*Second Children’s Digital TV NPRM*).

<sup>73</sup> Joint Proposal of Industry and Advocates on Reconsideration of Children’s Television Rules, MM Docket No. 00-167 (filed Feb. 9, 2006), available at [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6518329861](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518329861). See also FCC Notice, *FCC Opens Comment Period on Joint Proposal for Changes to Children’s Television Rules*, 2006 WL 685665 (March 17, 2006).

<sup>74</sup> 2006 Report & Order, *supra* note 11. The Commission adopted the provisions of the Joint Proposal after a public comment period. See *Second Children’s Digital TV NPRM*, *supra* note 72; 2006 Report & Order, *supra* note 11, at 11069-70. Neither the Joint Proposal nor the FCC’s 2006 decision made significant changes to the multicasting rule that had been adopted in 2004 (except that the Commission “clarify[ed] the way in which repeats of core programs will be counted under the new rule). 2006 Report & Order, *supra* note 11, at 11066.

Despite the theoretical significance of these developments, there have been few FCC findings that stations violated the children's E/I rules, except as to commercial time limits or violations of record-keeping rules.<sup>76</sup> The most visible enforcement action was the Univision settlement, in which Univision – whose stations had improperly claimed that a Spanish language telenovela satisfied the core E/I programming guideline – agreed to pay \$24 million and abide by a compliance agreement as a condition of FCC approval of its transfer applications in connection with a merger.<sup>77</sup> Advocacy groups have complained about the dearth of FCC action, arguing that the Commission has not been disciplining stations whose E/I programming is inadequate.<sup>78</sup> In 2007, the Commission sought comment on the status of children's educational programming.<sup>79</sup> FCC Chairman Genachowski recently announced – in his testimony at Senate Commerce Committee's recent hearing seeking to update the Children's Television Act for the modern media

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<sup>75</sup> Joint Proposal, *supra* note 73 (stand down provision). *See also* 2006 Report & Order, *supra* note 11, 21 FCC Rcd. at 11068 ¶ 9 & n. 20 (describing the judicial challenges).

<sup>76</sup> *See, e.g.*, UPN Television Stations Inc., WUPL(TV), 20 FCC Rcd. 15807 (2005) (imposing \$4000 forfeiture for failure to maintain children's programming records in station's public file). *See also* discussion *infra* at Section III.A. The Commission has also denied petitions to deny the license renewal applications of 18 Chicago television stations on the ground that the petitioners' claims that the stations had been "systematically negligent in their public interest requirement to air three hours per week" of children's E/I programming because the petition "contain[ed] statements of opinion as opposed to the specific allegations of fact necessary to make out a prima facie case . . ." Third Coast Press, 21 FCC Rcd. 14415 (2006).

<sup>77</sup> Shareholders of Univision Comm., Inc., 22 FCC Rcd 5842 (FCC 2007). *See also* note 27, *supra* and note 184, *infra*.

<sup>78</sup> *See* discussion *infra* at Section III.E.2.

<sup>79</sup> FCC Public Notice, Commission Seeks Comment on the Status of Children's Television Programming, 2007 WL 1147050, 22 F.C.C.R. 7267 (2007), *available at* <http://www.fcc.gov/mb/policy/kidstv.html>.

environment – that the Commission would be opening a new proceeding regarding children’s television regulation.<sup>80</sup>

## ***II. The Constitutionality of the FCC’s Children’s Educational Programming Rules:***

The issue of the constitutionality of affirmative children’s television programming requirements has not yet been litigated, presumably because of the negotiated, voluntary basis through which both the original analog rules and the subsequent digital rules were ultimately adopted.<sup>81</sup> Initially, as noted above, broadcasters voluntarily agreed as part of a political compromise brokered under the auspices of the Clinton White House not to challenge the constitutionality of the rule in 1996.<sup>82</sup> The broadcasters’ position may well have been influenced by their desire not to derail the government’s promised “digital giveaway.”<sup>83</sup> Analogously, the final digital children’s television rules constituted the adoption of a negotiated compromise between the broadcast interests and public interest

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<sup>80</sup> See Statement of Julius Genachowski, *supra* note 10.

<sup>81</sup> An assessment of those government-industry-public interest group negotiated regulations is beyond the scope of this Article.

<sup>82</sup> Campbell, *Lessons From Oz*, *supra* note 42; Popham, *supra* note 42, at 8-16 (describing events leading up to FCC’s decision).

<sup>83</sup> Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905 (1997); Varona, *Changing Channels*, *supra* note 18, at 85; Chairman Reed E. Hundt, Remarks to Citizens for a Sound Economy, Washington D.C., June 18, 1997, *available at* 1997 WL 332306 (“You remember the giveaway of digital TV licenses to today’s broadcasters. It was the largest single grant of public property to anyone in the private sector in this century.”)

children's advocates.<sup>84</sup> The children's television rules have not yet been subject to *as applied* constitutional attacks either.<sup>85</sup>

Were the rules to be challenged under the First Amendment, however, it is likely that they would pass constitutional muster both under the more regulation-tolerant broadcast precedent and under more traditional First Amendment scrutiny as well.<sup>86</sup> Our First Amendment tradition contains both an autonomy-based strand historically applied in the print context and a democracy-reinforcing interpretation deployed since the early 20<sup>th</sup> Century in the broadcast context.<sup>87</sup> The Supreme Court has historically tolerated a

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<sup>84</sup> See *supra* note 73. See also 2006 Report & Order, *supra* note 11 (congratulating parties on having negotiated a resolution in the DTV context).

<sup>85</sup> Although media public interest groups spearheaded license renewal challenges under the Commission's rules, contending that broadcasters had not satisfied their children's educational programming requirements, they did not seek judicial review of the agency's rejections of their claims. There are still several pending license challenges grounded on claims of licensee non-compliance with the children's programming requirements. John Eggerton, *UCC Challenges Two More TV Licenses*, BROAD. & CABLE, August 31, 2005, [http://www.broadcastingcable.com/article/157926-UCC\\_Challenges\\_Two\\_More\\_TV\\_Licenses.php](http://www.broadcastingcable.com/article/157926-UCC_Challenges_Two_More_TV_Licenses.php); John Eggerton, *CDD Challenges DIC Kids Expert*, BROAD. & CABLE, Sept. 7, 2004, [http://www.broadcastingcable.com/article/101809-CDD\\_Challenges\\_DIC\\_Kids\\_Expert.php](http://www.broadcastingcable.com/article/101809-CDD_Challenges_DIC_Kids_Expert.php).

<sup>86</sup> Accord Ronald J. Krotoszynski, *The Inevitable Wasteland: Why The Public Trustee Model of Broadcast Television Regulation Must Fail*, 95 MICH. L. REV. 2101, 2124 (1997). Professor Krotoszynski has concluded that – although the issue is not clear from doubt – “[o]n balance, I am convinced that the government may enact viewpoint-neutral requirements on commercial television broadcasters to meet the educational needs of the nation's children. This result can be reached either by applying *Red Lion* or by rethinking whether commercial children's television programming even constitutes noncommercial speech.” *Id.* at 2124 (nevertheless concluding that such affirmative obligations are unwise as a matter of policy.) See also Krotoszynski, *Into the Woods*, *supra* note 26.

<sup>87</sup> See, e.g., Jonathan Weinberg, *Broadcasting and Speech*, *supra* note 18. See generally ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA (Lee C. Bollinger & Geoffrey R. Stone eds. 2002). Cf. C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 72-79 (arguing that First Amendment precedents could be read to justify viewpoint-neutral structural regulation of print as well as electronic media). For various articulations of the view that the First Amendment is consistent with government intervention to promote democracy via some speech rules, see generally, OWEN M. FISS, LIBERALISM DIVIDED (1996); OWEN M. FISS, THE IRONY OF FREE SPEECH (1996); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1995); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993); Owen M. Fiss, The Censorship of Television, 93 NW. U. L. REV. 1215 (1999); Cass R. Sunstein, Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499 (2000). See also C. Edwin Baker, *Media Concentration: Giving Up On Democracy*, 54 FLA. L. REV. 839, 851-56 (2002) (adopting a broad interpretation of structural regulation); Stephen Breyer, *Our Democratic Constitution*, 77 NYU L. REV. 245, 252-53 (2002). See also MINOW & LAMAY, *supra* note 42, at 105-137.

significantly less stringent degree of First Amendment scrutiny for government regulations affecting broadcast speech than it has in connection with newspapers, cable, and the Internet. Having recognized that “differences in the characteristics of new media justify differences in the First Amendment standards applied to them,”<sup>88</sup> the Court has upheld in the broadcast context content regulations akin to those that it has struck down for newspapers.<sup>89</sup>

Despite more than a decade of extended criticism of broadcast exceptionalism,<sup>90</sup> the Court continues to demonstrate a high degree of tolerance for broadcast regulation, even if its analyses appear to isolate and cabin broadcasting.<sup>91</sup> Thus, it can be argued that

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The rhetoric of the 1996 Order first adopting the E/I requirements refers extensively to this vision of the First Amendment.

<sup>88</sup> Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969). See also *Reno v. ACLU*, 521 U.S. 844, 868 (1997) (“[E]ach medium of expression . . . may present its own problems”); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637-38 (1994) (describing adjustment to First Amendment analysis required by the scarcity of broadcasting); *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (“We have long recognized that each medium of expression presents special First Amendment problems.”)

<sup>89</sup> Compare *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down right of reply statute for newspapers) with *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (upholding fairness doctrine). (Professor Baker has distinguished *Miami Herald* from *Red Lion* because the right of reply statute was triggered in *Miami Herald* by the newspaper’s choice of speech – in effect, it was a governmentally imposed punishment for the newspaper’s decision to speak in a particular way. Baker, *Media Concentration*, *supra* note 87, at 852 n. 81; Baker, *Turner Broadcasting*, *supra* note 87, at 111-14. However, Professor Baker concludes from that observation not that the First Amendment should preclude content regulation in broadcasting, but rather that government speech interventions designed to promote speech should be acceptable in the print context as well.) See also *CBS v. FCC*, 453 U.S. 367 (1981) (upholding reasonable access for federal candidates under Section 312(a)(7) of the Communications Act of 1934); *Pacifica Found. v. FCC*, 438 U.S. 726, 758-61 (1978) (upholding FCC channeling of indecent programming). See also *McConnell v. Federal Election Commission*, 540 U.S. 93, 124 S. Ct. 619, 712-20 (2003) (opinion of Breyer, J.) (upholding Title V of the Bipartisan Campaign Reform Act of 2002 (BCRA)).

<sup>90</sup> Criticisms of the scarcity justification for differential treatment of broadcasting are by now legion. For citations to the central sources, see, e.g., Varona, *Changing Channels*, *supra* note 18; Yoo, *Technology-Specific First Amendment*, *supra* note 18, at 293. The Supreme Court is well aware of the critique of scarcity. *FCC v. League of Women Voters*, 468 U.S. 364 n. 11 (1984) (“The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years.”)

<sup>91</sup> Even in *FCC v. League of Women Voters*, for example, the Court was “not prepared . . . to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.” *FCC v. League of Women Voters*, 468 U.S. 364 n. 11 (1984) (citations omitted). In *Turner*

the Commission's children's television rules fit well under the umbrella of the First Amendment broadcasting precedent.<sup>92</sup>

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*Broadcasting System v. FCC*, 512 U.S. 622 (1994) (“*Turner I*”), the Court distinguished broadcasting from cable: “The scarcity of broadcast frequencies thus required the establishment of some regulatory mechanism . . . . In addition, the inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees.” *Id.* at 637-638; accord *Reno v. ACLU*, 521 U.S. 844, 868-869 (1997) (distinguishing Internet transmissions from broadcast on the basis of the scarcity rationale, improbability of “invasive” or accidental reception of [indecent] material, and the history of “extensive government regulation” in the broadcast medium); *McConnell v. FEC*, 540 U.S. 93, 233-246 (2003) (opinion of Breyer, J.) (upholding 47 U.S.C. § 315(e), which requires maintenance of political advertising requests by candidates). *Cf.* *FCC v. Fox TV Stations, Inc.*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1800, 1806 (2009) (dictum in Justice Scalia’s opinion implying the Court’s continued acceptance of broadcast exceptionalism: “Twenty-seven years ago we said that “[a] licensed broadcaster is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.”). The Court has expressed reluctance to undermine long-settled systems and recognized the justificatory power of history in other contexts. *See Denver Area Educ. Telcoms. Consortium v. Fcc*, 518 U.S. 727, 761 (U.S. 1996). In addition, the Court may ground broadcast exceptionalism on a recognition of administrative discretion to manage a commons. *See, e.g.,* Lili Levi, *The Four Eras of FCC Public Interest Regulation*, 60 ADMIN. L. REV. 813 (2008). Justice White observed in *Red Lion* that at the inception of broadcasting, Congress could have required broadcasters to share their frequencies with others, and the fact that it did not choose to do that formally at the time did not mean that the FCC could not constitutionally impose analogies to such spectrum-sharing requirements if it wished to. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389 (1969). In addition, the precedent upon which *Red Lion* relied to support its conclusion was not a broadcast precedent, but the classic news agency case – *Associated Press v. United States*, 326 U.S. 1 (1945), cited in *Red Lion*, 395 U.S. at 387, 390, 392. *See also* Baker, *Media Concentration*, *supra* note 87, at 861. One might conclude, then, as does Professor Baker, that *Red Lion* was the Court’s way of establishing a rather broad proposition in support of the constitutionality of government attempts to correct for limitations of the market. *See generally* Baker, *Media Concentration*, *supra* note 87. To the extent that we read *Red Lion*, then, as a general precedent supporting a governmental role in structuring fairness and access in the communications order, a different question is posed about the Court’s continuing adherence to that notion than is posed by simply asking whether the Court’s acceptance of scarcity as a regulatory rationale can still survive the damning criticism to which the notion has been subjected since Ronald Coase’s attack. For whatever reason, broadcast regulation still appears to be treated as a First Amendment ‘special case’ by the Court.

<sup>92</sup> For example, the FCC, in its children’s television orders, relied on broadcast precedents such as *CBS v. FCC* and *Turner Broadcasting v. FCC* in addition to the *Red Lion* case discussed above. The Commission argued that, like the children’s television rules, the statute upheld in *CBS v. FCC* “require[d] broadcasters to air certain types of programming they might not otherwise choose to provide” 1996 Children’s Television Rules, *supra* note 11, at ¶ 150 (referring to the limited right of access granted by Section 312(a)(7) of the Communications Act to individual candidates running for federal office which was upheld by the Court against First Amendment challenge in *CBS v. FCC*, 453 US 367 (1981)). Indeed, the FCC noted that by prohibiting broadcasters from having any control over political advertising to be aired by the station pursuant to § 312(a)(7), the compelled speech required by § 312(a)(7) “appears to be significantly more burdensome than the obligation imposed by the CTA.” *Id.* Rather than having its editorial discretion effectively eliminated – as under § 312(a)(7) – the 1996 children’s television requirement allows broadcasters to “retain wide discretion in choosing what programs to provide.” *Id.*

The FCC also relied on *Turner Broadcasting System v. FCC*, dealing with the FCC’s “must carry” requirement, which compelled local cable operators to carry, upon request and without charge, the signals of local broadcast stations within their service areas. *Turner Broad.*



Admittedly, some *Red Lion* critics have seen in some more recent Supreme Court cases a distancing from the distinct treatment of broadcasting.<sup>93</sup> Some appellate court opinions addressing structural regulation of the electronic media have dismissed broadcast exceptionalism and required stringent First Amendment scrutiny of FCC

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Sys. v. FCC, 512 U.S. 622, 630-32 (1994) (*Turner I*). In *Turner I*, the Court rejected the contention that cable regulations should be reviewed under the limited scrutiny given broadcast regulations, thereby implicitly reaffirming broadcasting's constitutional atypicality, according to the Commission's 1996 Order. See also *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*). If the *Turner* Court would find that indecency regulations and equal time and personal attack rules would survive constitutional scrutiny in the broadcast context, then, according to the FCC, "so, *a fortiori*, would the Commission's considerably less intrusive proposal for giving meaningful effect to the Act by defining "core" educational programming and establishing a procedure that broadcasters can use to assure routine staff processing of the CTA portion of their renewal applications." 1996 Children's Television Rules, *supra* note 11, at ¶ 151.

Moreover, the *Turner I* Court found that must carry rules were content-neutral and thus subject only to intermediate rather than strict scrutiny. See, e.g., *Turner I*, *supra*, 512 U.S. at 676 (O'Connor J. concurring in part and dissenting in part). Even though Congress' findings had specifically focused on the desirability of diversity of views, local programming, and educational programming, the lead opinion in *Turner I* characterized them as reflecting Congress' acknowledgment that the services provided by broadcast television had some intrinsic value and were worth preserving against the threats posed by cable. *Id.* at 648 (Kennedy, J.) The children's E/I requirements can be characterized similarly. 1996 Children's Television Rules, *supra* note 11, at ¶ 152 (concluding that "[o]ur new regulations, like the CTA itself, impose reasonable, viewpoint neutral conditions on a broadcaster's free use of the public airwaves. They do not censor or foreclose speech of any kind. They do not tell licensees what topics they must address."

Lower court precedent exists as well. In *Time Warner Entertainment Co. L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996), *reh. en banc denied*, 105 F.3d 723 (1997), the court upheld both the leased access and public, educational and governmental (PEG) programming provisions of the 1994 Cable Act and a provision of the 1992 Cable Television Consumer Protection and Competition Act which required licensees of direct broadcast satellite (DBS) services to reserve between four and seven percent of their channel capacity "exclusively for non-commercial programming of an educational and informational nature" were upheld against First Amendment attack (despite the availability of other media sources such as cable and broadcast.) *Time Warner*, *supra*, 93 F.3d at 973. See also Marvin Ammori, *Beyond Content-Neutrality: Understanding Content-Based Promotion of Democratic Speech*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1078483&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1078483&download=yes) (forthcoming 2009) (arguing that content promoting rules should receive more First Amendment deference than content-suppressing rules and that they do so in broadcasting precedent). See also 2006 Report & Order, *supra* note 11, at 11072-73, 11078-80.

<sup>93</sup> Professor Yoo, for example, has characterized recent Supreme Court cases as reflecting an increasing dissatisfaction with the technology-driven approach to the First Amendment. Yoo, *Technology-Specific First Amendment*, *supra* note 18, at 283-292. Justice Scalia's opinion in *FCC v. Fox* does tend in the other direction, however.

regulations.<sup>94</sup> This may be the consequence of an “ideological drift”<sup>95</sup> that has led the First Amendment to be appropriated by corporate media interests. Arguments can also be made that affirmative programming requirements for children substantively go further than even the existing broadcast precedent can justify constitutionally.<sup>96</sup>

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<sup>94</sup> See Yoo, *Technology-Specific First Amendment*, *supra* note 18, at 292 (characterizing lower court decisions as undermining fundamental regulatory justifications in broadcast context). See also Baker, *Media Concentration*, *supra* note 87, at 851-56 (2002) and cases cited therein; Michael J. Burstein, Note, *Towards a New Standard for First Amendment Review of Structural Media Regulation*, 79 NYU L. REV. 1030, 1037-38 (2004) and cases cited therein. Some lower courts have treated corporate media entities principally as rights holders in their own right, rather than as proxies or trustees or intermediaries for the public’s expressive interests. These courts have imposed a significant justificatory burden on the government even for regulations of industry structure. (By contrast, other courts have resisted big media’s appropriation of the First Amendment and upheld FCC structural regulations with less anti-regulatory scrutiny. See, e.g., *Prometheus Radio Project v. F.C.C.*, 373 F.3d 372 (3d Cir. 2004).) Media analysts have split on the desirability of these developments. Some have extolled the lower courts as finally recognizing the incoherence of differential broadcast regulation. Others have decried the purported “Lochnerization” of attempts to regulate media as improperly subjecting mere economic regulation to unduly searching constitutional review. Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 45 (1998); Burstein, *supra*, at 1057-64.

<sup>95</sup> Jack M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 375-87 (describing “ideological drift” of free speech idea to protect corporate interests). See also Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 NYU L. REV. 1, 26-9 (2004).

<sup>96</sup> For example, the cases on which the Commission has relied for its constitutional analysis can be distinguished from the children’s television rules. By contrast to *CBS v. FCC*, 453 US 367 (1981), the specific children’s television E/I rules were not statutorily mandated. The Court in *CBS v. FCC* applied the deferential standard of review of administrative decisions – assessing whether they were arbitrary and capricious. 453 U.S. at 382, 390. The case also concerned an as-applied challenge, and Supreme Court noted the appeals court’s finding that the FCC’s statutory interpretation was “a constitutionally acceptable accommodation between, on the one hand, the public’s right to be informed about elections and the right of candidates to speak and, on the other hand, the editorial rights of broadcasters.” *Id.* at 376 (citing to appellate opinion) (citations omitted). Moreover, the opinion makes much of the fact that the access statute relates to elections. *Id.* at 396. Finally, the majority specifically concludes that the statute did not “impair the discretion of broadcasters to present their views on any issue or to carry any particular type of programming.” 453 U.S. at 397. The FCC’s notion that § 312(a)(7) of the 1934 Act actually imposes more of a constraint on broadcasters’ speech choices is questionable. There, at least on a narrow reading, the question is about broadcasters’ degree of choice regarding political advertising. The time constraints involved in the case were limited – both in terms of the political ads themselves, and with regard to the limited relevance of the obligation to election periods. And broadcasters’ own speech was arguably not compelled – licensees were simply asked to open

The next question, therefore, concerns the application of non-broadcast First Amendment analysis to the children's television rules. The Commission has claimed that the children's E/I programming requirements, when properly construed, should be treated as content-neutral regulations subject to intermediate (rather than strict) constitutional

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some room in their schedule for the speech of others. In the children's television context, government is dictating a particular type of substantive programming that displaces others that the broadcaster might prefer to air. Arguably, the children's television rules affect the broadcaster's own speech and editorial decisions more directly than the reasonable access rules for federal candidates. Moreover, although an affirmative access obligation was upheld in *CBS v. FCC*, the Supreme Court also held in *CBS v. Democratic National Committee* that the First Amendment did not require CBS to air paid editorials on public issues. *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) (rejecting constitutional right of access of Business Executives Move for Vietnam Peace to air anti-war commercial on CBS).

As for *Turner*, the Supreme Court's analysis may be faulted for its analysis of content neutrality. Broadcast regulations were not at issue in *Turner* and the Court's remarks about broadcasting were simply *dicta*. Moreover, the broadcast rules mentioned in *Turner I* differed from the affirmative content obligations involved in the children's rules (such as the indecency rules that channeled indecent material to late night hours.) And by contrast to the must carry rules (which provide access for local stations regardless of programming content), the educational television rules create an obligation specifically requiring broadcasters to privilege a particular category of programming. See *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 726 (D.C. Cir. 1997)(Williams, J. dissenting) (dissenting from denial of rehearing *en banc* on the ground that *Turner I* was distinguishable on these grounds from the imposition of quantitative educational television obligations on DBS providers). Moreover, *Turner* involved a situation in which Congress was concerned about the effect of cable on the fundamental viability of over-the-air broadcasting. *Turner I, supra*, 512 U.S. at 633-34 (describing Congressional findings of cable's threat to economic viability of free local broadcast television). See also Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV 311, 320-21 ("Turner might be described as holding that some speakers may be restricted in order to enhance the speech of others if the reason is distribution rather than favoritism.")

Finally, reference to analogous channel set-aside cases decided by the appellate courts does not silence the debate, either. In the DBS context, for example, the *Time Warner* court may have felt compelled to apply existing Supreme Court precedent, regardless of its persuasiveness in the current "post-scarcity" climate. Also, the panel's position could not command a majority of the full D.C. Circuit. A petition for rehearing *en banc* was denied by a 5-5 vote, with the five dissenters arguing that *Red Lion* should not be extended to justify content regulations for DBS providers. 105 F.3d at 724. The dissenters emphasized that the new DBS technology "already offers more channel capacity than the cable industry, and far more than traditional broadcasting." *Id.* Indeed, those dissenters questioned the continuing viability of *Red Lion* "[e]ven in its heartland application" to broadcasting. *Id.* at 724 & n. 2. In addition, the court – citing *Turner* – characterizes the set aside as not dictating specific content. With regard to the leased access and PEG channel aspects of the *Time Warner* opinion, the court was addressing a facial challenge to the legislation and explained that in practice, "were local authorities to require as a franchise condition that a cable operator designate 3/4 of its channels for educational programming defined in detail by the city council," serious First Amendment concerns would arise. *Time Warner Entertainment Co., L.P. v. F.C.C.*, 93 F.3d 957 (D.C.Cir. 1996). Where the children's educational television rules fit is unclear on the court's articulated continuum.

scrutiny.<sup>97</sup> Because the FCC does not attempt to assess programming quality so long as shows are designed for children and intended to be educational, the agency has characterized its children’s television regulations as content neutral.<sup>98</sup> Arguably, the FCC’s children’s television obligations are closer to economic regulation than the purposeful and censorious content regulation that is strictly prohibited by the First Amendment. (It isn’t even irrational to see broadcasters as intermediaries rather than traditional First Amendment speakers, especially in the children’s television context, because most of them are no longer the content-creators at all. While the rules are content-related to the extent that they focus on a particular subject, the reason that they focus on the subject is arguably determined not by administrative preference, but by failures in the structure of the market in electronic media.<sup>99</sup> One could argue then that the children’s educational programming rules do not pose the dangers we associate with

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<sup>97</sup> 1996 Report and Order, *supra* note 11, at 10730; 2004 Children’s DTV Report and Order, *supra* note 11, at 22,956. It is beyond the scope of this Article to tackle the theoretical challenges to the attempt to distinguish between content-based and content-neutral government regulation of speech. Both academic and judicial critics have voices skepticism about the viability of a formal, binary content-based/content-neutral approach to the First Amendment. *See, e.g.,* Wilson R. Huhn, *Assessing the Constitutionality of Laws That are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801 (2004) and sources cited therein; Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347 (2006) and sources cited therein; Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 114 (1981). Even for those who think that the distinction is functionally if not theoretically workable, however, drawing the line in practice has been judged difficult. *See, e.g.,* Turner Broad. Sys. v. FCC, 512 U.S. 622, 642 (1994) (recognizing the difficulty of drawing the line between content-based and content-neutral regulations).

<sup>98</sup> 1996 Report and Order, *supra* note 11, at 10660. *See, e.g.,* 2006 Report & Order, *supra* note 11, 21 F.C.C.R. at 11073 ¶¶ 19 (arguing that children’s television rules in digital broadcast context do not violate the First Amendment because they merely give “nonmandatory guidance” on how to comply with the Children’s Television Act; and because the CTA itself – which no party to the 2006 Order has challenged – “reflects a preference” for children’s educational television over other content).

<sup>99</sup> *See* discussion of the market for children’s educational television in Section III.E.1., *infra*.

content-based rules – at least to the same degree.<sup>100</sup> The rules arguably inhabit a regulatory reality that lies between traditional content regulation designed to censor particular types of speech and traditional viewpoint regulation. Courts might well apply less searching scrutiny to children’s educational programming requirements if they were convinced that the hybrid character of the rules – with their “pay or play” aspect – truly gave broadcasters a choice not to speak in response to the government’s demand.<sup>101</sup>

Alternatively, even if the content-neutrality argument is found unpersuasive (because it might be argued that the 1996 rules specify the governmentally-preferred subject matter, seek to define it, and implicitly contain a substantive educational vision), the Commission’s rules might well still satisfy more stringent constitutional analysis as well.<sup>102</sup> The welfare of children has been the most significant trope used at least in the

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<sup>100</sup> For example, we might worry that in imposing content-based rules affecting expression, an administrative agency might in fact be trying to mask viewpoint-based interventions. Or we might fear that content-based rules would force speakers to utter speech with which they disagreed. More generally, we might be concerned that by allowing government to dictate the content of expression, we would be allowing the state to set the agenda for public discussion and debate. See Geoffrey R. Stone, *Content Neutral Restrictions*, 54 U. CHI. L. REV. 46, 54-57 (1987) (suggesting that content-based laws are more likely to be improperly and speech-restrictively motivated and to distort public debate). These particular fears are not implicated to a very significant degree by the hybrid regulatory format chosen for children’s educational television.

Admittedly, arguments can be made that the children’s television rules do implicate these concerns. Preferred viewpoints arguably are implicit in the structure of the children’s educational programming policy. Similarly, the requirement that broadcasters air children’s educational programming does affect broadcasters’ expressive agendas. Nevertheless, the FCC’s definition of educational programming does not itself promote any particular viewpoint, regardless of how broadcasters are likely to interpret it. It is also an exaggeration to say that the agency has hijacked the agenda for public discourse via its children’s E/I rules. Particularly in light of the degree to which the rules preserve broadcaster discretion, the focus on content in the processing guideline is less worrisome than in the traditional content-regulation context. Some have gone further yet, arguing that broadcasters’ expressive choices are commercially motivated and should be treated as commercial speech. See, e.g., Krotoszynski, *Into the Woods*, *supra* note 26.

<sup>101</sup> The approach can be thought of as analogous to the scrutiny given campaign contributions since *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*). While contributions facilitate and enhance speech, they are not seen as tantamount to or equivalent to speech.

<sup>102</sup> See, e.g., 1996 Children’s Television Rules, *supra* note 11, at 10663-64, 10728-34; 2006 Report & Order, *supra* note 11, at 11072-73 (FCC’s own analysis under purported strict scrutiny).

past decade by those calling for legal rules to shape socialization norms.<sup>103</sup> The state's obligation to educate children has been characterized as uncontroversially important.<sup>104</sup> The Supreme Court's consistent findings about the compelling governmental interest in the protection of children<sup>105</sup> suggest deference to Congress and the Commission's focus on the improvement of children as well. Unsurprisingly, the Commission has claimed that the CTA and the agency's regulations directly advance the government's "substantial – and even compelling – interest in the education of America's children."<sup>106</sup> Congress and the Commission have made official findings that television has the power to teach children and that it is needed to enhance the deteriorating state of public education.<sup>107</sup>

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<sup>103</sup> See Kenneth L. Karst, *Law, Cultural Conflict, and the Socialization of Children*, 91 CAL. L. REV. 967 (2003).

<sup>104</sup> See Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992 Cable Act, which calls the interest in educating children "compelling"). See also 1996 Report & Order, *supra* note 11, 11 F.C.C.R. at 10730-10731, ¶ 153 ("The CTA and our regulations directly advance the government's substantial, and indeed compelling, interest in the education of America's children. As Congress recognized, "[i]t is difficult to think of an interest more substantial than the promotion of the welfare of children who watch so much television and rely upon it for so much of the information they receive." In other contexts, the courts and commentators have recognized the government's "compelling" interest in "safeguarding the physical and psychological well being" of minors.")

<sup>105</sup> See, e.g., *United States v. Playboy Entm't Group Inc.*, 529 U.S. 803 (2000); *Reno v. ACLU*, 521 U.S. 844, 869 (1997); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *New York v. Ferber*, 458 U.S. 747 (1982); *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968).

<sup>106</sup> 1996 Children's Television Rules, *supra* note 11, at ¶ 153; 2006 Report and Order, *supra* note 11, at ¶ 19.

Arguably, this could be the basis for a claim that constitutional deference should be given to broadcast content regulation not because of the special character of broadcasting (*see supra* text accompanying notes 87 to 92), but because children's E/I regulation is a regulation about a special, distinct category of speech – speech to children. Maybe, some might say, children are a specially protected group as to whom speech can be regulated, because of the nature of the hearer. Since a distinct amount of our First Amendment jurisprudence can be characterized as an attempt to identify categories in which speech will in fact be regulable, it is plausible to make this claim. The problem, however, is that this approach is troublingly expansive and unnecessary for the conclusion that the children's E/I rules should pass constitutional muster.

<sup>107</sup> 1996 Children's Television Rules, *supra* note 11, at ¶ 1 (*quoting* 47 U.S.C. § 303(a)). See also Senate Report, *supra* note 21, S. Rep. No. 227, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. 5-9 (1989); Education,

As for the tailoring prong of scrutiny analysis, the discretionary character of the pay-or-play structure should arguably support deference to the FCC. Airing three hours weekly is not the only option provided under the statute (even though it is in fact the most convenient option under the current rules applicable in the analog context.)<sup>108</sup> Although they do provide a timing benefit in the license renewal process to broadcasters who comply with the suggested programming minima, the rules do not formally mandate or compel a particular amount of children's programming. The consumer-empowering design of the informational disclosure aspects of the rule as well is likely to be acceptable. The disclosure approach has received judicial and statutory approval in many contexts and has not triggered First Amendment scrutiny.<sup>109</sup> As for the definition of

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Competitiveness, and Children's Television, Hearing Before the Subcommittee on Communication of the Committee on Commerce, Science, and Transportation, U. S. Senate, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess., at 1-4 (April 12, 1989.)

<sup>108</sup> In other words, the very flexibility and imperfection of what some may find unsatisfactory about market-based models in the ecological and environmental contexts may make such models more acceptable when they regulate speech and therefore balance both expressive and other important governmental concerns.

In addition to the First Amendment argument, it is likely that the E/I rules would also satisfy a regulatory takings challenge. Even if the broadcast license today is best thought of in functional terms as a property right, and even though there is a rather stable Supreme Court jurisprudence according to which the government cannot impose disproportionate conditions on property rights, the specifics of the Commission's rules undermine a disproportionate condition argument.

<sup>109</sup> On the benefits of disclosure as a regulatory strategy and "one of the most striking developments in the last generation of American law", see, e.g., Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 613, 625 (1999). See also SUNSTEIN, *supra* note 87, at 532-33. There has been a move in other regulatory areas to adopt informational regulation strategies (whether to assist consumers, or trigger political checks, or both.) For a discussion of the various contexts involving speech in which courts do not see the First Amendment as relevant, see generally Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1778-80 (2004). For example, despite criticisms of its adequacy, disclosure is the prevailing regulatory strategy in the securities context. See, e.g., Stephen J. Choi & A.C. Pritchard, *Behavioral Economics and the SEC*, 56 STAN. L. REV. 1 (2003). For detailed discussions of the relationship between securities regulations and the First Amendment, see, e.g., Antony Page, *Taking Stock of the First Amendment's Application to Securities Regulation*, 58 S.C. L. REV. 789 (2007.); Michael Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM & MARY L. REV. 613 (2006); Symposium, *The First Amendment and Federal Securities Regulation*, 20 CONN. L. REV. 261 (1988). This general trend is based on the notion that disclosure requirements are likely to lead to improved performance. SUNSTEIN, *supra* note 87. Even in the media context, the adoption of the V-chip and its attendant ratings system reflect an assumption that

children's educational programming, it is arguably no more vague and malleable than other statutes that have withstood First Amendment vagueness challenges in the past.<sup>110</sup> Thus, while there are of course counterarguments,<sup>111</sup> this Section concludes that the existing children's educational programming rules would likely be found constitutional.

### ***III. The Effectiveness of the FCC's Approach***

Despite its probable constitutionality under existing law, is the FCC's children's educational television regime effective in application or are there preferable alternatives? The arguments ventilated at the recent Congressional hearing assumed that the CTA and Commission rules should be both retained and strengthened. But, as Justice Breyer asked

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information will empower viewer choice. *Id.* at 533. See also Yoo, *Technology-Specific First Amendment*, *supra* note 18 (relying on the technological fix provided by the V-chip). Of course, complaints about the ineffectiveness of the V-chip and the ratings system abound. See, e.g., John Eggerton, *Nets Team Up on V-Chip Primer*, BROAD. & CABLE, March 30, 2004; Schmitt, *supra* (noting parental lack of familiarity with the V-chip). See generally <http://www.kff.org/entmedia/vchip.cfm> (linking to Kaiser Family Foundation studies).

<sup>110</sup> In the election context, for example, the Supreme Court held that the Bipartisan Campaign Reform Act's requirement that broadcasters retain records of requests to air messages regarding "political matter of national importance" and "national legislative issue of public importance" was not unconstitutionally vague or overbroad. *McConnell v. FEC*, 540 U.S. 93 (2003). Similarly, the FCC's post-1987 definition of indecency – defined as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community broadcast standards for the broadcast medium, sexual or excretory organs or activities." – was found not to be unconstitutionally vague in *Action for Children's Television v. FCC (ACT I)*, 852 F.2d 1332 (D.C. Cir. 1988). See [www.fcc.gov/parents/content.html](http://www.fcc.gov/parents/content.html).

One of the ways in which the 1996 Children's Report and Order attempted to walk the fine line between governmental regulation and the First Amendment concerns of broadcasters was to define core programming in large part pursuant to "objective" criteria. The only "subjective" element of the definition of core programming is the requirement that the program be significantly designed to have an educational or informational purpose. This is still not about quality of result – rather, it is about design and intent, not an assessment of outcome.

<sup>111</sup> See, e.g., Reply Comments of Fox Television Holdings Inc., In the Matter of Status of Children's Television Programming, available at [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519739005](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519739005); Reply Comments of CBS Corporation, In the Matter of Status of Children's Television Programming, available at [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519739027](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519739027); See generally Yoo, *Technology-Specific First Amendment*, *supra* note 18.



in a different context: “is the game worth the candle?”<sup>112</sup> This Section argues – on the basis both of empirical data and structural factors – that it is probably not. Ultimately, although the Commission’s E/I approach appears to do no harm (and may provide some benefit), it does distract attention from the development of potentially more effective and desirable alternatives. Before the current rules are enhanced and expanded, the FCC and Congress should insist on the collection of much more data and engage in searching analysis – both with respect to regulatory goals and current results.

The agency’s articulated regulatory goals are underdeveloped and under-theorized. Moreover, its rules have the effect of outsourcing national education policy to commercial entities whose economic imperatives stand in tension with such public obligations. Empirical evidence suggests that the current rules also have not led to an efflorescence of excellent children’s educational programming in the over-the-air broadcast context. As evidenced from the extensive briefing on the subject, critics from both sides of the aisle question the rules’ effectiveness.<sup>113</sup> There are both economic and structural explanations for this state of affairs, all of which diminish the possibility that the current approach could ever become very effective.

*A. Regulatory goals in tension:*

With respect to regulatory goals, a review of the CTA and the Commission’s approach to children’s television since 1996 reveals some degree of tension among multiple goals and uncertainty about the metrics to be used to assess regulatory

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<sup>112</sup> Ashcroft v. ACLU, 542 U.S. 656, S. Ct. 2783, 2801 (2004) (Breyer, J. dissenting).

<sup>113</sup> Comments filed in the FCC’s rulemaking process (here Docket #00-167) can be found through its ECFS search tool: [http://fjallfoss.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://fjallfoss.fcc.gov/prod/ecfs/comsrch_v2.cgi).

effectiveness.<sup>114</sup> However, the Commission has neither recognized the differences among these different goals, nor attempted to analyze or mediate between them.<sup>115</sup> If it did, it might have to explore the tensions between some of them, the uncertainties on which many are based, and the fact that they would not all lead to the same kinds of rules

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<sup>114</sup> The FCC has justified its intervention into children's educational television on a variety of grounds: a statutory obligation, the medium's pervasiveness, influence, and ability to teach, the special needs of children, concern about welfare of television-watching children, the failures of the public educational system, the potential for television to benefit society, the need to protect stations serving the public from more profitable competition, a desire to increase the amount of children's educational programming on television, the correction of predictable market failure in the production of E/I programming, the provision of programming information to parents, assisting private negotiations by the provision of programming information to media watchdog groups. 1996 Report & Order, *supra* note 11, at ¶ 24 (noting that Congress has required broadcasters to serve the special needs of children); 2006 Order, *supra* note 11, at ¶ 4 (noting that television plays a major role in the lives of children and they they watch a significant amount of television before they go to school formally); *see also* 2004 Children's DTV Report and Order, *supra* note 11, at ¶ 3; Policies and Rules Concerning Children's Television Programming, Report and Order, 11 F.C.C.R. 10660, 10731-32 ¶¶ 155-156 (1996)(finding that television "has an influence on children in our society rivalled only by family and school. . . . a pervasive presence in the lives of American children" and that . . . [T]he government's interest in the intellectual development of our nation's children is at least as significant as its interest in protecting them from exposure to indecent material.); 2006 Order, *supra* note 11, at ¶ 5 (Congress has recognized that television can benefit society by helping educate and inform children.); 1996 Report & Order, *supra* note 11, at ¶ 22 (characterizing the goal of the CTA as increasing the amount of children's educational programming on television); 1996 Report & Order, *supra* note 11, at ¶¶ 1, 29, 30 (noting that the rules were adopted in order to correct market failure); 1996 Report & Order, *supra* note 11, at ¶¶ 6, 125 (explaining rules as a way to create a level playing field for broadcasters to air children's television) (For discussions of studies demonstrating the uses and effectiveness of research in the production of children's educational programming, *see, e.g.*, "G" IS FOR GROWING: THIRTY YEARS OF RESEARCH ON CHILDREN AND *SESAME STREET* (Shalom M. Fisch & Rosemarie T. Truglio, eds. Lawrence Erlbaum Associates, Pubs. 2001).) *See also* Amy B. Jordan, THE FIRST ANNUAL ANNENBERG PUBLIC POLICY CENTER'S CONFERENCE ON CHILDREN AND TELEVISION: A SUMMARY, No. 6, June 17, 1996, at 19-20 (*APPC First Annual Conference Summary*); Christopher Stern, *FCC's Hundt Takes Children's Television Under His Wing*, BROAD. & CABLE, July 24, 1995, at 61 (Chairman Reed Hundt's competitive level playing field explanation for the rules).

With respect to expanding the E/I rules to broadcasters' digital streams, the Commission stated that it had three goals: to create a commensurate increase in children's programming, to give broadcasters flexibility, and to deal with the lack of parental awareness. 2004 Children's DTV Report and Order, *supra* note 11, at ¶ 17. The Commission saw it as "entirely consistent with the First Amendment to ask trustees of the public airwaves to pursue reasonable, viewpoint-neutral measures designed to increase the likelihood that children will grow into adults capable of fully participating in our deliberative democracy." *Id.* at ¶ 154.

<sup>115</sup> For example, regulations for the improvement of children implicate different possible interests – such as helping children achieve their role as citizens and members of society; helping them learn; promoting their intellectual development; helping parents educate their children; redressing the market failure in the commercial children's television market; providing a counterweight to the influence of commercial television; facilitating the state's obligation to educate children; and promoting diversity of ideas. The language of the 1996 Order reflects a number of these themes but does not discuss the differences among them.

in operation.<sup>116</sup> Moreover, when the E/I rules are addressed in light of the broader, overall regulatory scheme, it becomes clear that the commercial advertising time limits of

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<sup>116</sup> The following are some of the questions raised by this recitation of multiple regulatory goals. For example, it is true that Congress in 1990 found a need for broadcasters to serve the child audience. But this general Congressional finding does not necessarily lead to the specific rules chosen by the Commission in 1996 and extended thereafter. Moreover, even if we agree that over-the-air television stations should serve the special needs of children, how are those needs to be defined? In other contexts, scholars have challenged the notion of the child as “natural” and pre-cultural category and discussed the social construction of the ideas of childhood and the child. See, e.g., CONSTRUCTING AND RE-CONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD (Allison James & Alan Prout eds., 1990). Moreover, despite the teaching effectiveness of some television programming, research suggests that children may well be harmed by watching too much television daily, especially in the younger years. See, e.g., Amy B. Jordan et al, Reducing Children’s Television-Viewing Time: A Qualitative Study of Parents and Their Children, 118 PEDIATRICS 1303 (2006), available at [www.pediatrics.org/cgi/content/full/118/5/e1303](http://www.pediatrics.org/cgi/content/full/118/5/e1303); Dmitri A. Christakis et al., Early Television Exposure and Subsequent Attentional Problems in Children, 113 PEDIATRICS 708 (2004). But see Huston & Wright, *supra* note 44, at 12-14, 17-21; Daniel R. Anderson, Educational Television Is Not An Oxymoron, 557 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 24, 26-33 (1998)

To the extent that the Commission’s goal is to increase the amount of children’s educational television over-the-air, it is not clear that an insufficiency as such has been demonstrated. The market disincentives to produce quality children’s E/I programming in wholly advertiser-supported media should not in themselves suffice to lead to a presumption of insufficiency in light of the extent to which cable television and PBS have virtually appropriated the field of children’s programming.

The relationship between “bad” and “good” children’s educational programming is also complex. Isn’t the best way for broadcasters to serve the special needs of children to forgo airing the bad children’s entertainment programming associated with violence and consumption? But is it necessarily the case that requiring good programming will eliminate bad programming? What kind of metric can we use to assess whether this goal is being achieved?

The question of quality and educational success is also fundamentally comparative. Moreover, child psychology is an evolving science. There isn’t necessarily a clear consensus on the determinants of effective children’s educational programming (especially when we move away from the clearly cognitive, curricular-style lessons of Sesame Street). (Even as venerable a children’s educational program as Sesame Street has been questioned with respect to the educational character of some of its format decisions. See SHALOM M. FISCH, CHILDREN’S LEARNING FROM EDUCATIONAL TELEVISION: SESAME STREET AND BEYOND 19-20, (2004).) Reliance on expertise is not a satisfactory standard. Broadcasters that developed content for children in response to the FCC’s requirements apparently did so in consultation with outside experts, most from academia – at least in the early years of the rules. Karen Hill-Scott, *Industry Standards and Practices: Compliance with the Children’s Television Act*, in HANDBOOK OF CHILDREN AND THE MEDIA 605, 607 (Dorothy Singer & Jerome Singer, eds. 2001). Nevertheless, recent studies complain of the insufficiency of quality E/I programming. See Section III.D, *infra*.

To the extent the rules are designed to promote full participation in deliberative democracy, it is unclear how they will accomplish this given their particular structure. Obviously, this depends on a number of factors: one’s vision of deliberative democracy and participation (and whether there isn’t an implicit viewpoint in this goal, contrary to the Commission’s claims), as well as how and whether the goal of democratic participation is promoted by television (particularly in light of the discretion given broadcasters with respect to their E/I compliance).

Despite its attempts to find the middle way, critics from all points of view can also find fault with the Commission’s definition of core educational programming. The task of crafting a substantive definition of children’s educational programming is fraught with difficulties and line-drawing problems. It is unclear why programming containing pro-social lessons can’t – whether designed for adults or older children – achieve the same sorts of educative effects as those implicit in the FCC’s definition of children’s E/I

the Children's Television Act ironically undercut the ability of broadcasters to generate ever-improving substantive programming for children.

In addition to the complex relationships of these goals *inter se*, they also stand in tension with the Commission's concern for the preservation of the editorial freedom and expressive interests of broadcasters in this area. Thus, for example, although the FCC for the first time adopted a definition of children's educational programming in its 1996 rules, the definition was designed to promote as much licensee freedom as possible.<sup>117</sup> The Commission has made clear that it "will ordinarily rely on the good-faith judgments of broadcasters" with respect to children's educational programming.<sup>118</sup> Ultimately,

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programming. It also begs the question why we should distinguish between programming designed to educate children and general audience programming that has some educational value?

As for the market argument, with respect to the Commission's claim that the rules create an even playing field among broadcasters, it is not clear whether this is true. For example, consolidation in the media industry can have an impact on licensees that is likely to skew such economic calculations. As a result of Disney's ownership of ABC, for example, ABC presumably has more economical access to children's educational programming. ABC's Disney-based children's E/I programming supports this conclusion. *See, e.g.* Christy Glaubke, et al., *Big Media, Little Kids 2*, Children Now (2007) (finding that children's television offerings dropped significantly after FCC relaxed duopoly/triopoly rules). Moreover, this FCC argument makes a number of untested assumptions about the ways in which broadcasters use competitor comparisons. The data discussed below suggest that a significant percentage of broadcasters are barely complying with the Commission's E/I rules. It is unclear how the other stations in the market assess such programming by their competitors. Moreover, the underlying market failure is not that some broadcasters wish to air children's educational programming but will be deterred by their competitors' failure to do so. Rather, as has been found by Congress and the FCC, all broadcasters face the same economic disincentives to air children's educational programming. Thus, a broadcaster that wishes to air high quality children's E/I programming will lose money regardless of what its competitors do. (Of course, they could lose more money than their competitors.)

To the extent that the E/I rules are designed to serve as an adjunct to public education, they also raise questions about federal education policy. *See* discussion in Section III.B., *infra*.

<sup>117</sup> 1996 Report and Order, *supra* note 11, at 10662. For example, the goal of the definition of "core" children's educational programming was to enhance the quality of children's educational programming while respecting broadcaster discretion as much as possible through the adoption of "objective" metrics focused on the process of creation and distribution rather than substantive assessments of quality.

<sup>118</sup> 1996 Children's Television Rules, *supra* note 11, at ¶¶ 4, 88. The agency assured broadcasters that: "we are not interested in influencing -- or even knowing -- the viewpoint of any core programming. The test of whether programming qualifies as core does not depend in any way on its viewpoint, but solely on whether it is "specifically designed" to serve children's educational and informational needs. . . ." 1996 Children's Television Rules, *supra* note 11, at ¶ 87.

these multiple sets of tensions undermine the potential effectiveness of the Commission's E/I rules.

*B. National Education Policy?*

To the extent that the CTA and the FCC's rules focus on the potential of television to act as an adjunct to the public education system, the Commission's guidelines also constitute a federal experiment with outsourcing educational responsibility to the private sector. While this probably unintended consequence can be both praised and criticized, it is at least clear that it has been under-theorized. Nor has the FCC coordinated its initiatives with either state or federal departments of education.

In principle, the Commission's children's educational programming requirements could beneficially lead to an improved national supplement to the variability in the scope and quality of local, decentralized public education. They could inculcate a common learning culture in today's youth, regardless of the incommensurability of students' diverse local educational experiences. This could be quite desirable, particularly to the extent that racial and economic inequalities hobble the effectiveness of universally available public education. At a minimum, it does not seem inconsistent with the goals of federalized education policy.

On the other hand, there has been no analysis looking at whether the Commission's decision to place the educational mission in the hands of private entities with economic incentives to produce inexpensive programming is the best decision from the point of view of education policy.<sup>119</sup> If we accept the recent assessments of the low

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<sup>119</sup> It is true that school boards sometimes consult with private entities in the development of school curricula, for example. In those situations, however, the official, public school boards are still the ultimate arbiters and exercise the final content control role. That would not be the same in the broadcasting context,

quality of much children's programming characterized by broadcasters as educational,<sup>120</sup> we might wonder whether the goal of a high-quality national education is (or realistically can be) met through the half-hearted compliance of commercial broadcast stations with regulatory requirements. Even if it can be, will the national fare be skewed in ways that should be studied because of the advertiser-supported character of the medium?<sup>121</sup> And isn't it possible that the FCC's goals could be undermined if the combination of challenging economic circumstances and the purported availability of educational programming on television would lead to funding reductions for some public school programs? Might there be greater advantages to the development of national education policy through the coordinated efforts of the various responsible governmental departments and agencies than through the post-1996 efforts of the FCC?

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particularly in light of the FCC's explicit expression of the discretion granted broadcasters for the substantive content of their educational offerings. 47 C.F.R. § 73.671, n. 1).

Some might argue that the FCC's promotion of national education policy does not appropriately balance the interest in a national culture with traditional assumptions about the local and public character of education policy. Traditionally, the federal, state and local relationship with respect to education have been characterized by much local autonomy, although the influence of the federal government on state and local education policy has increased significantly in recent years with the passage of the No Child Left Behind Act, Pub.L. 107-110, 115 Stat. 1425 (2001). *See also* PATRICK J. MCGUINN, *NO CHILD LEFT BEHIND AND THE TRANSFORMATION OF FEDERAL EDUCATION POLICY, 1965-2005* (U. Press Kansas 2006) (describing education federalism). And although state requirements have enhanced uniformity over local schools at least in some jurisdictions as well, local school boards and school authorities still have significant autonomy in American education. This decentralization has led to significant variation in educational coverage, educational diversity, and educational quality across the country.

<sup>120</sup> Recently, a report by the children's advocacy group Children Now concluded that only 13% of shows claimed to satisfy the E/I requirement are highly educational while 23% are minimally educational. Barbara J. Wilson, et al., *Educationally/Insufficient? An Analysis of the Availability & Educational Quality of Children's E/I Programming*, CHILDREN NOW (2008) (also finding that children's educational television relies mostly on social-emotional lessons (67% of all shows) and neglects children's cognitive needs, such as art, nutrition, health and mathematics). *See also* discussion in Section III.C, *infra*.

<sup>121</sup> Analogously, there have been complaints about the commercialism of Channel One, which has been made available to public schools. *See, e.g.*, Christine M. Bachen, *Channel One and the Education of American Youths*, 557 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE at 132 (May 1998); Lisa Jacobson, *Advertising, Mass Merchandising, and the Creation of Children's Consumer Culture*, in CHILDREN AND CONSUMER CULTURE IN AMERICAN SOCIETY: A HISTORICAL HANDBOOK AND GUIDE 1, 19 (L. Jacobson, ed. Praeger 2008).

*C. Considerations of Regulatory Scarcity:*

Media regulation is doubtless subject to regulatory scarcity: Regulators must select among numerous plausible policy initiatives. They do so in light of structural, economic, and political factors. The question this raises is how should the benefits of the children's television rules be assessed against the systemic effect of the FCC's media interventions overall. Airtime programming decisions are a zero sum game. If broadcasters have to provide a significant amount of children's educational programming, they will be displacing some other kind of content that might otherwise air.<sup>122</sup> The question then is whether a regulatory policy that calls for the airing of children's educational programming on commercial stations – without enforceable quality requirements, and even when large percentages of the audience are already wedded to cable and public television – will unduly displace other valuable, programming on at least some part of the broadcast medium.

For example, today's media has a striking need for an expanded commitment to serious journalism.<sup>123</sup> With the decline in the fortunes of the daily newspaper, the "if it bleeds, it leads" tunnel-vision of local television news, the challenges to the traditional business model of the mainstream media, and the increasing expense of investigative reporting, among a host of other factors, serious journalism is threatened at every turn. This is particularly worrisome in light of the expanded powers of the post-9/11 state and

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<sup>122</sup> One possibility is that children's educational programming will simply replace the more undesirable children's entertainment programming that the broadcasters would otherwise air. Another is that while some broadcasters would children's educational programming would displace children's entertainment programming, others would displace different types of pro-social programming instead.

<sup>123</sup> See Levi, *Regulatory Equilibrium*, *supra* note 31. See also Dan Rather, *The News Americans Need*, WASH. POST ONLINE, Aug. 9, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/07/AR2009080703183.html> (last visited Aug. 11, 2009).

the widespread failure in the private commercial world. Hard-hitting journalism of the kind that has toppled presidencies, no less than coverage of more local moment, is at risk. Without minimizing the potential social value of easily accessible high-quality children's educational programming, it is not irrational to wonder whether society might not be better served by promoting worthy journalism instead of the "so-so" children's E/I profile over broadcast television generated by the existing FCC rules. At least until the current regime is improved, regulatory scarcity counsels more attention to journalism. After all, at least some good quality children's E/I television *is* available on cable and public television. Investigative journalism is still looking for its home.

*D. The Empirical Evidence So Far -- Mixed Outcomes:*

Given the complexities associated with mandating children's educational programming, it would be useful to understand empirically the effects of the FCC's rule since its inception in the "real world". Despite the fact that broadcasters are required to file with the FCC (and make publicly available) quarterly forms listing their children's educational programming,<sup>124</sup> and despite FCC promises that Commission Staff will provide empirical studies of the rules' effects every three years,<sup>125</sup> there has been only limited empirical study of the subject.<sup>126</sup>

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<sup>124</sup> 47 CFR §§73.671, 73.673, and 73.3526(e)(11)(iii).

<sup>125</sup> See 2004 Children's DTV Report and Order, *supra* note 11, at 22966.

<sup>126</sup> Wilson et al., *Educationally/Insufficient*, *supra* note 25, at 4 ("Since the completion of the last Annenberg Center study in 2000, no systematic research has been conducted to evaluate how well the broadcast industry is fulfilling its obligation to provide educational and informational television programming for the nation's children."). Dr. Amy Jordan and her colleagues at the Annenberg Public Policy Center conducted three annual studies of children's E/I programming after the rules were first adopted. The first study was Amy Jordan, *The State of Children's Television: Programming for Children Over Broadcast and Cable Television*, Annenberg Public Policy Center (1997)(APPC 1996-97 Study). The



Specifically, the evidence thus far consists of one FCC Staff Study addressing programming until 1999,<sup>127</sup> three annual reports by the Annenberg Public Policy Center of the University of Pennsylvania addressing pre-2000 data,<sup>128</sup> and one recent academic report prepared on behalf of the children's advocacy group Children Now in 2008.<sup>129</sup>

These empirical data reveal mixed results: while almost all broadcast licensees purport to comply with the Commission's three hour guidelines, few stations significantly exceed that amount of children's educational programming, the educational quality of the programming overall has been diminishing in the past decade, broadcast E/I programming is viewed by experts as mixed at best, and most broadcasters air their E/I programming during on weekend days rather than during the week.<sup>130</sup>

First, the data on the number of hours of weekly E/I programming. The available studies support the conclusion that the majority of stations responded to the

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next study was Kelly Schmitt, *The Three Hour Rule: Is It Living Up to Expectations?*, Annenberg Public Policy Center (1999) (*APPC 1998-99 Study*). Finally, Dr. Jordan published the third study: Amy Jordan, *Is the Three-Hour rule Living Up to Its Potential?*, Annenberg Public Policy Center (2000) (*APPC 1999-2000 Study or Jordan, Three-Hour Rule*).

The FCC did open an inquiry into the status of broadcaster compliance with the children's E/I rules, but it has not yet released any studies or conclusions. FCC Public Notice, Commission Seeks Comment on the Status of Children's Television Programming, 2007 WL 1147050, 22 FCC Rcd. 7267 (2007). The comments filed in response to that notice can be found at [http://fjallfoss.fcc.gov/cgi-bin/websql/prod/ecfs/comsrch\\_v2.hts?ws\\_mode=retrieve\\_list&id\\_proceeding=00-167&start=1&end=315&first\\_time=N](http://fjallfoss.fcc.gov/cgi-bin/websql/prod/ecfs/comsrch_v2.hts?ws_mode=retrieve_list&id_proceeding=00-167&start=1&end=315&first_time=N).

<sup>127</sup> THREE YEAR REVIEW OF THE IMPLEMENTATION OF THE CHILDREN'S TELEVISION RULES AND GUIDELINES 1997-1999 (2001), available at [www.fcc.gov](http://www.fcc.gov) (*FCC Staff Report*).

<sup>128</sup> See, e.g., Jordan 2004, *supra* note 55, at 109; Jordan, *Three-Hour Rule*, *supra* note 126, at 25 (77% of programs moderately or highly educational); Kelly L. Schmitt, *The Three-Hour Rule: Is It Living Up to Expectations?*, Annenberg Public Policy Center, Report No. 30 (1999) at 26 (80% of programs met FCC's rule requirements).

<sup>129</sup> CHILDREN NOW REPORT, *supra* note 25. In addition, the Children's Media Coalition filed an Appendix of empirical data along with its comments in the Commission's 2007 inquiry into the status of children's television programming. The data, which was limited in its scope, had been collected by a review of forms filed with the FCC. See Children's Media Policy Coalition Comments, *supra* note 25. The Coalition's data appear consistent with those of the Children Now report.

<sup>130</sup> CHILDREN NOW REPORT, *supra* note 25, at 4-5, 11-23.

Commission's 1996 rules by increasing the number of hours of children's educational programming they aired.<sup>131</sup> Numerous stations aired more than the three hour minimum of E/I programming immediately after the rules were adopted.<sup>132</sup> There was a consensus among the researchers at the time that commercial broadcasters would not offer much educational programming for children without the FCC's requirements.<sup>133</sup> Almost a decade later, however, the *Children Now Report* was more pessimistic about the effectiveness of the requirements, concluding that "the passage of time since the FCC's last policy ruling on this topic in 1996 may be dampening the broadcast industry's

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<sup>131</sup> THREE YEAR REVIEW OF THE IMPLEMENTATION OF THE CHILDREN'S TELEVISION RULES AND GUIDELINES 1997-1999 (2001), available at [www.fcc.gov](http://www.fcc.gov) (FCC Staff Report). The 1999 FCC Staff Report – the only empirical study thus far released by the agency – concluded that the majority of stations aired between three and four hours per week of core E/I programming and complied with the rules' informational requirements during the 1997-1999 period. Thus, the FCC Staff concluded that – with the exception of some program preemption problems particularly for West Coast affiliates of the three largest networks (Id. at ¶¶ 28-31, 48) – the 1996 policy was effective in promoting a floor of core educational programming. Studies of pre-2000 data by the Annenberg Public Policy Center at the University of Pennsylvania (APPC) confirmed the FCC Staff Report. The number of E/I hours aired was a contrast to the pre-1996 findings. See, e.g., Jordan 2004, *supra* note 55, at 109; Jordan, *Three-Hour Rule*, *supra* note 126, at 25 (77% of programs moderately or highly educational in Philadelphia market from 1997-2000); Kelly L. Schmitt, *The Three-Hour Rule: Is It Living Up to Expectations?*, Annenberg Public Policy Center, Report No. 30 (1999) at 26 (80% of programs met FCC's rule requirements). See also Kunkel & Canepa, *Broadcasters' License Renewal Claims*, *supra* note 15, at 397, 408-414. The 2000 APPC report observed that local broadcasters had chosen to air between three and four hours per week of educational programming since 1997 in order to qualify for expedited license review Jordan, *Three-Hour Rule*, *supra* note 126, at 25.

<sup>132</sup> The Annenberg studies thus concluded that children's educational television in the US was "both expanding and improving." Dale Kunkel & Brian Wilcox, Children and Media Policy in HANDBOOK OF CHILDREN AND THE MEDIA 589, 598 (Dorothy G. Singer & Jerome L. Singer eds. 2001)(characterizing Annenberg findings overall). A study of "industry insiders," including network executives, children's television producers, and consultants conducted by one of APPC's researchers in the late 1990s indicated that "most respondents felt that the Three-Hour Rule marked a turning point in the quality and availability of children's educational programming." Jordan 2004, *supra* note 55, at 111.

<sup>133</sup> *Id.* at 112. Some specifically admitted this in the press. See, e.g., Meg James, *TV Networks Find Ways to Stretch Educational Rules*, L.A. TIMES, Feb. 23, 2002, at 1, available at 2002 WLNR 12427650 ("Increasingly, the only thing keeping the major networks in children's programming is the federal requirement that their stations air three hours a week of educational programming); Brian Lowry, *On TV Where Do the Kids Fit In?*, LA TIMES, Dec. 12, 2001, at F1, 2001 WL 28936148 (NBC acknowledged last week that the network would have exited the children's business entirely by now were it not for the FCC guidelines . . ."). See also Frank Ahrens, *That's All Folks; Saturday morning tradition fades as networks bow out on kids' shows*, SEATTLE TIMES, Jan. 26, 2002, at A3, 2002 WL 38888551. Television stations certainly did not significantly increase their children's educational offerings in response to the specific exhortation in the Children's Television Act of 1990 to air programming designed for them. Kunkel & Goette, *supra* note 55, at 306-307. See also Jordan 2004, *supra* note 55, at 112 and sources cited therein.

commitment to children's educational programming.”<sup>134</sup> The *Children Now Report* asserted that although stations industry-wide continued to meet the three hour standard, averaging 3.32 hours per week of E/I programming, 59% aired only the minimum of three hours.<sup>135</sup> Moreover, the Children Now study found that market size was negatively correlated with the amount of E/I programming delivered, with major market stations delivering the lowest average amount of children's programming, at slightly over three hours per week.<sup>136</sup> In addition, the *Children Now Report* revealed that 75% of broadcasters have reverted to presenting children's E/I programming only on Saturdays and Sundays<sup>137</sup> despite the fact that children watch a significant amount of television during the week and more weekday educational programming had aired in prior years.<sup>138</sup> In addition to limiting E/I programming on weekdays, this meant that more of the shows would be preempted by other programming (such as sports events).<sup>139</sup> Parents still face

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<sup>134</sup> CHILDREN NOW REPORT, *supra* note 25, at 17.

<sup>135</sup> CHILDREN NOW REPORT, *supra* note 25, at 11-12. The 2008 study found that 59% of stations provided only the minimum of three hours per week of children's E/I programming, 37% exceeded that standard (programming between 3.1 and 4.0 per week), and 3% exceeded 4 hours per week. *Id.* Although the study strongly implies that the coverage is insufficient, it is currently the case, based on the study data, that less than 3% of the stations overall air less than 3 hours per week of children's E/I programming. *Id.* at 12, Table 3.

<sup>136</sup> CHILDREN NOW REPORT, *supra* note 25, at 11.

<sup>137</sup> *Id.* at 12. The largest markets had the lowest percentage of stations airing weekday programming (22%), with smallest markets having the highest percentage (32%). *Id.* As the study concludes: “The large majority of stations follow a dominant pattern that fails to provide educational children's programming Monday through Friday.” *Id.* at 13. See also Children's Media Policy Coalition Comments, *supra* note 25, at 5-6 (reporting on results of survey conducted by the Children's Media Policy Coalition in response to the FCC's 2007 inquiry into the status of children's television programming.)

<sup>138</sup> Children's Media Policy Coalition Comments, *supra* note 25, at 6 and associated Appendix.

<sup>139</sup> Children's Media Policy Coalition Comments, *supra* note 25, at ii, 6-7.

difficulties becoming aware of E/I programming because newspapers and television guides do not typically provide adequate information.<sup>140</sup>

Beyond the question of formal compliance is a more qualitative assessment, looking at the educational effectiveness of the CTA-responsive programming aired by broadcasters.<sup>141</sup> The *Children Now Report* concluded that while the proportion of shows with minimal educational quality has “held relatively constant over the past decade,” and the majority of shows was “moderately educational,” high quality children’s educational programming was “down dramatically[.]”<sup>142</sup> The Children Now study found that only 13% of E/I episodes were classified as highly educational in the 2007-2008 season, from a high of 29% in 1997.<sup>143</sup>

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<sup>140</sup> See 2000 Children’s Digital TV NPRM, *supra* note 50, 15 FCC Rcd. at 22961; CHILDREN NOW REPORT, *supra* note 25; 2004 Children’s DTV Report & Order, *supra* note 11, at 22950 ¶ 17.

<sup>141</sup> Unlike the FCC Staff study, which limited itself to quantitative analysis, the recent Children Now study and the APPC reports also contained qualitative aspects. CHILDREN NOW REPORT, *supra* note 25, at 4 (articulating goal of “evaluat[ing] the educational quality of the most widely viewed shows.”)

<sup>142</sup> According to the CHILDREN NOW REPORT, *supra* note 25, at 17: “the amount of E/I programs judged to be highly educational has dropped by more than half since the first Annenberg study was conducted.” Twenty percent of the children’s E/I program were judged highly educational by the Annenberg Center scientists in 2000 (a percentage already sharply lower than the findings of prior annual reports). CHILDREN NOW REPORT, *supra* note 25, at 17 (describing diminishing educational quality from 29% in 1997-1998 to 20% in 1999-2000, as found by the Annenberg Public Policy Center team.). With regard to educational strength, the APPC Report found that 77 percent of the educational/informational episodes in the sample were judged to meet the letter (and sometimes the spirit) of the FCC guidelines. *Id.* at 3, 20-23, 27. These numbers are consistent with prior findings subsequent to the adoption of the 1996 children’s television guidelines. In earlier findings, social scientists affiliated with the APPC found that 38.8% of the programs in an earlier sample of children’s programming could be considered high quality, with 37% considered low quality in the same market as that studied later in the APPC study described in text. Amy B. Jordan & Emory H. Woodard, IV, *Growing Pains: Children’s Television in the New Regulatory Environment*, 557 THE ANNALS OF THE AAPSS 83, 85 (1998). 23 percent of the studied programs were judged to be “minimally educational.” Jordan, *Three-Hour Rule*, *supra* note 126, at 3, 27 “failed to meet the APPC criteria for educational strength and . . . judged to be unlikely to provide substantive lessons for the audience.” *Id.* In fact, the report found that each year 1/5 to 1/4 of the programs labeled educational/informational were judged to have little educational value. *Id.* at 27-28.

<sup>143</sup> CHILDREN NOW REPORT, *supra* note 25, at 17. To assess educational quality, the CHILDREN NOW REPORT used six criteria: clarity, integration, involvement, applicability, importance, and positive reinforcement. *Id.* at 8-9. While the first four criteria were adapted from previous Annenberg Public Policy Center studies evaluating E/I programming, *id.* at 8, the last two criteria – lesson importance and lesson reinforcement – were new to the CHILDREN NOW REPORT. *Id.* at 9.

Moreover, there continues to be a distinct skew toward socio-emotional rather than cognitive-intellectual programming aired for children by commercial stations since the late 1990s.<sup>144</sup> And although the largest share of E/I programming (53%) was targeted to elementary school children, 13% targeted to preschoolers, and 33% to teenagers,<sup>145</sup> the educational quality of the programming was higher for programs targeted to the teenage/preteen audience than to that aimed at preschool children.<sup>146</sup> In addition, although the majority of E/I episodes did not contain physical aggression, they did contain social aggression (with 28% featuring a substantial amount of aggression.)<sup>147</sup>

When comparing the E/I programming on commercial stations to that aired by the PBS network, the Children Now study found that educational quality varied by channel type, with public broadcasting episodes achieving higher educational quality:<sup>148</sup> The type of primary lesson also differed significantly by channel type – with 55% of the episodes of PBS featuring cognitive-intellectual (rather than social-emotional) lessons.<sup>149</sup> According to the study, commercial broadcasters aired twice as many shows with “high

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<sup>144</sup> CHILDREN NOW REPORT, *supra* note 25, at 13-16. In the earlier study, fifty-seven percent of the programs were judged to address the social/emotional or cognitive/intellectual needs of children in some significant way. Jordan, *Three-Hour Rule*, *supra* note 126, at 3, 27. The CHILDREN NOW REPORT shows that 74% of the episodes studies contained social-emotional lessons. The most common type of social-emotional lesson involved teaching positive interaction with others, followed by lessons about self-esteem and self-restraint. V, *supra* note 25, at 13-14. Cognitive-intellectual lessons were less frequent, with less than half of the episodes (44%) containing any cognitive-intellectual aspects. *Id.* at 14. Only 3% of the lessons were about art or cognitive skills, and only 1% about teaching math. *Id.* Moreover, despite the epidemic of childhood obesity frequently featured in the nation’s newspapers, the recent study shows that only 10% of the programs showed health-related lessons. *Id.* at 15.

<sup>145</sup> *Id.*, at 15.

<sup>146</sup> *Id.*, at 18.

<sup>147</sup> *Id.*, at 18-19.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*, at 20.

levels of aggression.”<sup>150</sup>

*E. Explaining the Study Results:*

A closer look at the broadcaster incentives, internal FCC factors, and factors regarding audience information and access can account for the complex reality of broadcast children’s educational television programming.

*1. Broadcaster Incentives and Market Developments:*

A basic rationale for both the Congressional passage of the Children’s Television Act in 1990 and the three-hour rules adopted by the FCC in the *1996 Children’s Report and Order* rested in large part on perceived market failure.<sup>151</sup> The FCC claimed that the market would under-produce children’s educational programming because of the advertising-supported character of broadcasting. The literature has identified four continuing barriers to the production and airing of high-quality children’s programming: the intense competition for advertisers’ dollars; the heavy reliance on ratings; the perceived need to target the largest possible audience; and the narrow margin of profit.<sup>152</sup>

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<sup>150</sup> *Id.* at 21.

<sup>151</sup> See S. Rep. No. 227, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. 5-9 (1989). See also 1996 Children’s Television Rules, *supra* note 11, at ¶ 1, 29-34; 2000 Children’s Digital TV NPRM, *supra* note 50, at 22948. Scholarship in this area as well uniformly assumes the likelihood of market failure with regard to children’s television programming – whether the scholars are of a regulatory or deregulatory bent. See, e.g., THOMAS KRATTENMAKER & LUCAS A. POWE, JR., *REGULATING BROADCAST PROGRAMMING* 82 (Washington, D.C.: AEI Press, 1994); MINOW & LAMAY, *supra* note 42; C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311 (1997); Candeub, *Creating A More Child-Friendly Broadcast Media*, *supra* note 26; James T. Hamilton, *Private Interests in “Public Interest” Programming: An Economic Assessment of Broadcaster Incentives*, 45 DUKE L.J. 1177, 1180-81 (1996); Matthew Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 NYU L. REV. 990 (1989). Cf. Robert Corn-Revere, *Regulation in Newspeak: The FCC’s Children’s Television Rules*, Policy Analysis no. 268, Cato Institute (1997) (arguing that government compulsion can only increase the supply of children’s E/I programming, but cannot manufacture the demand).

<sup>152</sup> Amy B. Jordan & John L. Sullivan, *Playing By The Rules: Impact and Implementation of Children’s Educational Television Regulation Among Local Broadcasters*, 4 COMM L. & POL’Y 483, 501-

Because the child audience is much smaller than the adult population and therefore a niche market,<sup>153</sup> because children are not well-rounded consumers of the full panoply of advertised products and are therefore less desirable to advertisers,<sup>154</sup> and because many seek educational programming on cable and PBS,<sup>155</sup> analysts conclude that the child demographic will be underserved by commercial broadcasters. Children today also have less free time and many competitors vying for their attention, leading to a fragmented children's market.<sup>156</sup>

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505 (1999). See also Amy Jordan, *The Three Hour Rule: Insiders' Reactions*, Annenberg Public Policy Center, June 28, 1999, at 13-17, available at <http://www.annenbergpublicpolicycenter.org/NewsDetails.aspx?myId=147>. Keith S. Brown, *Empirical Aspects of Advertiser Preferences and Program Content of Network Television*, FCC Media Bureau Staff Research Paper (2003) (finding that advertisers discount programs starring or including children by 11%).

<sup>153</sup> There are overall a relatively small number of children from the advertiser's point of view. Some have suggested that in order for a program to be interesting to national advertisers, it must have at least approximately 75% clearance (reaching at least 75% of American television households.) Amy Jordan & John Sullivan, CHILDREN'S EDUCATIONAL TELEVISION REGULATIONS AND THE LOCAL BROADCASTER: IMPACT AND IMPLEMENTATION at 10 (June 9, 1997) (quoting a panel participant).

<sup>154</sup> See, e.g., In the Matter of Children's Television Programming and Advertising Practices, Report & Order, Docket No. 19142 (1984) at ¶¶ 6, 25.

<sup>155</sup> PBS is associated with the highest quality of children's educational programming, such as Sesame Street. Nickelodeon is the dominant children's programmer on cable, with children's educational programming also appearing on other cable channels, such as the Disney Channel, among others.

Some have said that "a kids marketer should devote 80 percent to 90 percent of ad dollars to cable because that's where the eyeballs are." Daisy Whitney, *Defining Distinct Niches: Building the Brand is the Name of the Game in Kids TV*, 22 TELEVISION WEEK, No. 10, March 10, 2003, 2003 WL 9140498 (quoting Starcom executive). Observers note that when the Children's Television Act was passed, more than half of all the children watching Saturday morning television were tuned in to ABC, CBS, NBC and Fox. By 2001, that number had apparently dropped to 26% of the children's audience. James, *TV Networks Find Ways*, *supra* note 133 (citing to Nielsen data). Cf. Alexander, *supra* note 44, at 497 (with a smaller number yet). In 2002, broadcast networks reduced children's programming spot prices because, although annual spending on child-oriented advertising had been increasing, about 55% had gone to Nickelodeon. See also Joseph Perreira, *Kid Stuff? Pow! Splat! Boom!*, WALL STREET JOURNAL, Oct. 18, 2002, at A1.

<sup>156</sup> Andrew Grossman, *Primed for Victory: Despite Some Negative Force Fields, Children's Networks Are Optimistic This Upfront*, 3/7/05 MULTICHANNEL NEWS, March 7, 2005, at 18, available at 2005 WLNR 3600495; Ivy Brown, *More Venues Divide Kids; Capturing Young Viewers is Major Challenge*, TELEVISION WEEK, Feb. 23, 2004, at 25, 2004 WL 63505737; Lauren R. Rublin, *Tuning Out: Who Wins, Who Loses as Kids Spend More Time on PCs and Less Watching TV*, BARRON'S, Nov. 18, 1999 at 37; Alexander, *supra* note 44, at 497. Even outside of cable competition, broadcasters "worry about competition in an increasingly crowded field." See, e.g., Valerie Kuklenski, *Children's Hours; No Longer Relegated to Saturday Morning, Networks Expand Reach for Highly Desirable Kid Viewers*, L.A. DAILY NEWS, Oct. 5, 2002, at 14, 2002 WL 5546730; Rublin, *supra*.

The economics of over-the-air television is also predicted to lead to lower quality children's educational programming.<sup>157</sup> E/I programming of the cognitive sort must appeal to narrow age ranges in order to be effective.<sup>158</sup> Since age-appropriate, high quality children's E/I programming is more expensive<sup>159</sup> and difficult to produce,<sup>160</sup> broadcasters will be under significant pressure to comply with the Commission's rules minimally at best. Studies indicate that "high quality programs draw smaller audiences than low-quality programs among children aged 2-11 years (the desired audience for advertisers.)"<sup>161</sup> Perhaps just as important as the reality is the widespread belief among broadcasters that children reject educational programming (particularly beyond preschool age)<sup>162</sup> and that stations cannot brand themselves by their children's offerings.<sup>163</sup>

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<sup>157</sup> For example, it has been argued that broadcast networks will simply do a bad job of providing children's educational programming. Ahrens, *That's All Folks*, *supra* note 133 (quoting Action for Children's Television founder Peggy Charren on Saturday morning network-produced children's programming).

<sup>158</sup> See *APPC First Annual Conference*, *supra* note 114, at 11. It stands to reason that a math program for a four-year old is of no interest to a seven-year old.

<sup>159</sup> See, e.g., Karen Goldberg Goff, *Watchful Rules for Television*, WASHINGTON TIMES, April 13, 2003, 2003 WL 7709386 (quoting media watcher for proposition that few commercial organizations are willing to invest the resources to produce engaging and beneficial programming for pre-teens).

<sup>160</sup> Id. Even though some note that children's programs are less expensive to produce than prime-time programs, the profit on such programs is smaller and depends on the necessarily uncertain factors of merchandising deals and international sales. See also John L. Sullivan & Amy B. Jordan, *Playing By the Rules: Impact and Implementation of Children's Educational Television Regulations Among Local Broadcasters*, 4 COMM. L. & POL'Y 483, 501; Alexander, *supra* note 44, at 503.

<sup>161</sup> Jordan & Woodard, *Growing Pains*, *supra* note 142, at 90.

<sup>162</sup> James, *TV Networks Find Ways*, *supra* note 133 ("Broadcasters and their advertisers see educational programming as the TV equivalent of leafy green vegetables. They're being force fed a restriction that drains profits. Young viewers are leaving in droves, finding better fare, whenever they want, on their cable menus."); Jordan 2004, *supra* note 55, at 113-115 (describing the views of industry insiders that: 1) the child audience had gone elsewhere; 2) lack of promotion; 3) lack of advertiser interest; 4) few alternative revenue streams for educational television.) See also Jordan & Woodard, *Growing Pains*, *supra* note 142, at 90-92; Alexander, *supra* note 44. The commercial broadcasters apparently believe that the most profitable programming is geared to boys, that girls will follow boys' viewing choices (but not vice versa), and that stations must therefore create programming that will be most likely to attract the largest audience of 2-11 year old boys. Jordan & Woodard, *Growing Pains*, *supra* note 142, at 90-91.



Because low audiences mean low ratings which in turn mean low revenues in the commercial television market, broadcasters express conviction that E/I programming will never be profitable.”<sup>164</sup>

If this view of the market still reflects current reality, it serves to explain the mixed results revealed by the empirical studies of the children’s E/I rules. But could the market have changed sufficiently as a result of the increasing empowerment of the child audience,<sup>165</sup> global marketing,<sup>166</sup> and the explosion in value of merchandising?<sup>167</sup> Is the

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<sup>163</sup> Jordan & Woodard, *Growing Pains*, *supra* note 142, at 85. Affiliates of the major three networks are more likely to define themselves through their local news programming and their network adult programming. *See also* Jordan & Sullivan, *supra* note 153, at 20 (“commercial broadcasters . . . do not build their identity on their children’s programming.”); Whitney, *supra* note 155, at 10 (same).

<sup>164</sup> Jordan, *supra* note 152, at 503. This appears to be the generally held view not only among academics, but in the industry at every level. *See, e.g.*, MINOW & LAMAY, *supra* note 42, at 57 (quoting “Captain Kangaroo”). *See also* Amy B. Jordan, THE STATE OF CHILDREN’S TELEVISION: AN EXAMINATION OF QUANTITY, QUALITY, AND INDUSTRY BELIEFS, Annenberg Public Policy Center, Report No. 2, June 17, 1996, at 27-31. This might lead to a vicious circle: “One consequence of broadcaster reliance on ratings is that programmers are less likely to air high-quality, educational programs and, when they do, are less likely to give them adequate production and promotional budgets [which will then presumably reinforce the low ratings].” *APPC First Annual Conference Summary*, *supra* note 114, at 5, 12, 20.

<sup>165</sup> It is becoming increasingly evident that children – even at an early age – have the ability to influence their parents’ purchasing patterns. *See, e.g.*, PECORA, *supra* note 44, at 98; Patti M. Valkenburg & Joanne Cantor, *The Development of a Child into a Consumer*, in CHILDREN IN THE DIGITAL AGE: INFLUENCES OF ELECTRONIC MEDIA ON DEVELOPMENT 201 (Sandra L. Calvert, Amy B. Jordan, Rodney R. Cocking, eds. 2002). Daren Fonda-Glendale, *Pitching It to Kids On Sites Like Neopets.com, brands are embedded in the game*, TIME, June 28, 2004, at 52; Jacobson, *supra* note 121; Kuklenski, *Children’s Hours*, *supra* note 156. Moreover, children themselves have more access to money today than was previously the case. Kuklenski, *Children’s Hours*, *supra* note 156. *See also* PECORA, *supra* note 44, at 7-23 (1998)(describing “how children came to be defined as consumers”); Martha Irvine, *Chew on that New Juicy Fruit Format, Flavors Aimed at Skippies*, MIAMI HERALD, July 5, 2003, at 8 (defining “Skippies” as a market-research acronym for school kids with income and purchasing power).

<sup>166</sup> *See generally* TIM WESTCOTT, THE BUSINESS OF CHILDREN’S TELEVISION (Screen Digest Ltd. 1999) (providing data on international children’s television market); TV Program Merchandising Potential Overshadowing Content, COMM. DAILY, March 10, 2003, 2003 WL 5754314 (noting that international sales and licensing are just as important as domestic revenue in children’s programming); PECORA, *supra* note 44, at 133-51. Some children’s programming has no dialogue, which may be helpful for global distribution. *Cf.* Dominic Schreiber, Children’s Programming, TELEVISION BUS. INT’L, Sept. 1, 2002, 2002 WL 15221520.

<sup>167</sup> Cable and PBS have shown that merchandising can add a highly lucrative component to children’s television programming, (as shown by the merchandising associated with Sesame Street and Dora the Explorer.) *See, e.g.*, TV Program Merchandising Potential Overshadowing Content, COMM. DAILY, March

economic picture for children's E/I programming over-the-air bleak as a result of mutable factors and choices attributable to broadcasters and ratings agencies?

Proponents of the FCC's rules describe a world in which children have money to spend, significant influence on their parents' purchasing decisions (called "the nag factor"), and rich futures as good consumers. They do not necessarily reject educational programming, if it is of sufficiently high quality.<sup>168</sup> Ratings arguably under-represent viewership of educational children's television.<sup>169</sup> Children's television advocates argue that if rating agencies tailored their methods more appropriately to the children's market,

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10, 2003, 2003 WL 5754314 (noting the "staggering" revenue generated by licensing, with toys licensed from children's television programs bringing in an estimated \$15 billion in 2003.); Kuklenski, *Children's Hours*, *supra* note 156; Whitney, *supra* note 155; Jordan, *The State of Children's Television*, *supra* note 164, at 30 (describing merchandising and quoting critics).

<sup>168</sup> Some studies conclude that most children are interested in quality and popularity of educational programs, and do not reject them out of hand simply because they are labeled as educational. Schmitt, *APPC Rept. # 30*, *supra* note 126; Jeffrey D. Stanger, *Television in the Home: The 1997 Survey of Parents and Children*, Annenberg Public Policy Center 21 (1997) at [www.penn.appc.org](http://www.penn.appc.org).

<sup>169</sup> Nielsen ratings are particularly problematic for children's programming: So, for example, if a program targets 5 to 8-year-olds, it is not serviced by Nielsen ratings which break the child audience down into 2 to 5 and 6 to 11-year-olds. Another problem with regard to ratings for children's educational programming may be an undercounting problem because so many children are viewing television outside of their own homes (for example, in day care and school settings). *APPC First Annual Conference Summary*, *supra* note 114, at 15. See also Catherine Schetting Salfino, *Tyke TV Grows Up*, BROAD. & CABLE, March 5, 2001, at 17 (explaining that the Nielsen distinctions between 2-5 and 6-11 year olds are unsatisfying because of the range of children's interests and household viewing habits). See also *APPC First Annual Conference*, *supra* note 114, at 20-21.

Children's advocates also urge that the lower ratings for children's educational programming (by comparison to action adventure cartoons) are attributable to the facts that educational programs are not aired in prime time and are not well-promoted. In fact, the recent Children Now Report indicates that the majority of E/I compliant programming is aired during the weekend. See note 25, *supra*. Media sociologists conclude that "[e]ducational shows do not have major marketing campaigns with a major fast food chains in the country; they are not put an attractive timeslot and kept there and promoted on a air." *APPC First Annual Conference Summary*, *supra* note 114, at 10 (quoting Dale Kunkel). In addition, producers claim that educational programs are given inadequate time to build an audience before they are shuffled around and/or canceled. *Id.*, at 20-21. See also *Jordan 2004*, *supra* note 55, at 113-14; Alexander, *supra* note 44, at 502-3; Jordan, *APPC First Annual Conference*, *supra* note 114, at 21; Amy B. Jordan, *THE STATE OF CHILDREN'S TELEVISION: AN EXAMINATION OF QUANTITY, QUALITY, AND INDUSTRY BELIEFS*, Annenberg Public Policy Center, June 17, 1996, at 34-35 (*Jordan 1996*). Without money to promote educational programs, children and parents may be unaware of their existence. See, e.g., Jordan & Woodard, *Growing Pains*, *supra* note 142, at 92-3 (on the importance of promoting educational programming and outreach to parents).

if advertisers and corporate underwriters were to “see beyond the ratings,” and if broadcasters scheduled and promoted children’s E/I programming more effectively, broadcasters’ traditional assumptions about the lack of profitability of children’s educational television might be challenged.<sup>170</sup> Moreover, with the additional capacity provided by digital transmission, broadcasters could decide to create their own equivalents to Nickelodeon.<sup>171</sup>

Whether the market has changed materially is at best a debatable proposition, however. The child audience is still a niche market requiring expensive programming appealing to narrow age bands. The reliance of the industry on ratings has not changed, despite the arguments made by children’s television advocates. The lack of empirical data makes it difficult for advertisers to ignore the ratings as currently constituted. The possibility of profitable children’s educational programming grounded on merchandising and international sales is both limited and controversial.<sup>172</sup> The economics of

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<sup>170</sup> Jordan & Woodard, *Growing Pains*, *supra* note 142, at 93; Jordan & Sullivan, *supra* note 153, at 26-27; Jordan 1996, *supra* note 126, at 32-33. Reputational benefits to advertisers of being associated with highly praised and promoted children’s educational programming – particularly if it is truly entertaining and beloved by children – should not be minimized. See Alexander, *supra* note 44, at 502-3 (on increasing importance of promotions, public service announcements, and educational outreach for program success).

<sup>171</sup> Broadcasters could thus choose to aggregate their “core” programming and simultaneously increase access to it by parents and children. *APPC Second Annual Conference Summary*, *supra* note 114, at 17-18. This is a business decision, not something dictated by television structure per se.

<sup>172</sup> Only the most popular programs have succeeded in developing significant merchandising revenues. Merchandising success is far from guaranteed. *Inter alia*, it depends on a successful underlying show and/or character. Those are particularly hard to predict for a children’s audience. Indeed, some – like Nickelodeon – typically wait up to two years after a show’s introduction to engage in merchandising efforts. See, e.g., Sherri Day, *SpongeBob and Pals Provide Licensing Gold for Nickelodeon*, NY TIMES, Jan. 9, 2003, at C1. While it is a truism that hits cannot be predicted even when geared to an adult audience, the child audience apparently presents even greater predictive difficulties. Much about this demographic remains under-studied and/or misunderstood. Jordan, *APPC First Annual Conference*, *supra* note 114, at 5.

Moreover, we may be ambivalent about the merchandising-based subsidy of children’s educational programming. It stands to reason that merchandising-based subsidies can have subtle skewing effects on the kind of educational programming that is produced. Merchandising may also raise analogous

broadcasting will likely create more incentives for pro-social than for cognitive E/I programming (as current data demonstrates).<sup>173</sup> Finally, if the economic picture were to change for children's E/I programming, broadcaster would presumably have incentives to adapt – regardless of regulatory directives, transaction costs being equal.

Arguments in support of the three hour floor might be based on the proposition that the requirement might expand the supply of children's programming, which in turn might be expected to lead to increased quality, amount, and diversity of such beneficial programming. However, while the effect of the past decade's media consolidation on children's programming apparently has been under-studied in both academic and policy circles, the one published report on the subject concluded that consolidation had had a "serious [negative] impact on the availability and diversity of children's programming [in the on the Los Angeles market]."<sup>174</sup> On the production side, media consolidation has diminished the number of producers of children's programming.<sup>175</sup> The production of

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concerns to those that led to Congress and the FCC's limitations on advertising in children's television shows under the CTA.

<sup>173</sup> See CHILDREN NOW REPORT, *supra* note 25. See also Sandra L. Calvert, et al., *Children's Online Reports About Educational and Informational Television Programs*, in CHILDREN IN THE DIGITAL AGE: INFLUENCES OF ELECTRONIC MEDIA ON DEVELOPMENT 165, 178-180 (Sandra L. Calvert, Amy B. Jordan, Rodney R. Cocking, eds. 2002); Jordan & Woodard, *Growing Pains*, *supra* note 142, at 87 (noting that "nearly all of the network-provided programs [studied in 1997] had pro-social messages as their primary educational goal."); Jordan, *Three-Hour Rule*, *supra* note 126, at 26 (same.)

<sup>174</sup> Children Now, BIG MEDIA, LITTLE KIDS: MEDIA CONSOLIDATION & CHILDREN'S TELEVISION PROGRAMMING 1, 3 (May 21, 2003), at [www.childrennow.org](http://www.childrennow.org). It is beyond the scope of this Article to assess the *Children Now Consolidation Study*. The study itself notes that the work is only beginning in this area, and calls for further research. *Id.* at 10. See also Rethinking the Children's Television Act for a Digital Age, *supra* note 7, Statement of Gary E. Knell, Pres. & CEO, Sesame Workshop (noting "tremendous consolidation of children's media in which the top three media companies (Nickelodeon, Disney and Cartoon Network) account for 92% of 6 to 11 year-olds' viewing on the main kids' broadcast and cable networks and control a lion [sic] share of the market on the web. . . . [C]onsolidation has made it quite challenging for independent producers to emerge and prosper . . .")

<sup>175</sup> According to the President of Children Now, a children's advocacy group, 20 studios or production companies supplied 68% of all prime time programming in 1970, while by 2002, only 10 such

such programming is currently dominated by major studios, some international producers and co-production entities, and a few independent production companies.<sup>176</sup> Media analysts characterize the barriers to program entry into the children's television market as "enormous."<sup>177</sup>

In addition, the 1990s witnessed an increasing trend toward the vertical integration of program producers and distributors.<sup>178</sup> Vertical integration has the potential to displace independent programmers because as major networks now own production studios, they are likely to prefer programming from those studios or to purchase a block of programming from an independent.<sup>179</sup> On the one hand, the expansion of channel capacity can serve as an open invitation for program producers, with more supply lines requiring more content for distribution. On the other hand, if industry behemoths capture the market for distribution, they can determine who survives as a content provider. And if such major players are themselves increasingly vertically integrated, then the fear of discrimination against independent program producers becomes even more acute.<sup>180</sup> In this kind of environment, independent production

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studios programmed 88% of prime time. Michael Reisch, *Give Children Diverse Programming*, SEATTLE POST-INTELL., March 7, 2003, at B7, 2003 WL 6291311.

<sup>176</sup> See, e.g., Alexander, *supra* note 44, at 500. When independents become successful, they are acquired by larger entities. *Id.*

<sup>177</sup> *Id.* Professor Alexander explains that production companies retain ownership of the shows, and operate on a "near-term deficit-financing model," relying on future profits from aftermarket sales and merchandising agreements. *Id.* at 501. While networks pay licensing fees to air the programs, licensing fees for children's programming have been decreasing with the increase in the fragmentation of the child audience. *Id.*

<sup>178</sup> See, e.g., *Id.*; *Who Owns What?*, [www.cjr.org](http://www.cjr.org).

<sup>179</sup> Alexander, *supra* note 44, at 502.

<sup>180</sup> One media observer has noted that the FCC's adoption of the Prime Time Access Rule (that limited network control over prime time) and the Financial Interest and Syndication rules (that limited network program production investments) during the 1970s lead to an increase in the number of

companies can find it hard to place their programming.<sup>181</sup> Increasing consolidation and vertical integration may lead to more repurposing, because that will be cheaper than experimenting with new programming.<sup>182</sup>

## 2. *FCC Enforcement Limitations:*

The anti-compliance pressure likely to be generated by broadcasters' economic incentives will in turn increase the costs to the FCC of tracking and assessing compliance. There is a more intractable hurdle yet, however – the apparent agency paralysis triggered by the attempt to mediate values in tension.

The evidence for this is that the FCC's approach to rule enforcement in this area already demonstrates significant delay and hesitancy. The FCC's on-line records disclose that most of the Commission's enforcement efforts have been limited and indirect, focusing on violations of the advertising limitations.<sup>183</sup> With regard to the programming rules, the Commission has only acted in response to pressure from advocacy groups. For example, in only one instance since 1996 has the Commission imposed a significant fine

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independent stations and of children's programming for such stations. PECORA, *supra* note 44, at 28, 34, 42. See also Alexander, *supra* note 44, at 500. Poorly capitalized, these independent stations became outlets in the 1980s mostly for animated children's programming tied to toys and other products: "In a market of intense competition, these product-based programs minimized risks both in production costs and ratings. The cost of producing the program could be spread between program producers and product manufacturer or licensor, and recognition of either the product merchandise or the program increases sales and ratings." *Id.* at 34.

<sup>181</sup> Alexander, *supra* note 44, at 502.

<sup>182</sup> See *id.* at 503 for discussion of the finding that the children's television market is moderately concentrated. See also *supra* n. 174 (describing BIG MEDIA, LITTLE KIDS, the recent Children Now consolidation study).

<sup>183</sup> See, e.g., KEVN, Inc., 8 FCC Rcd 5077 (1993); Bay Television, Inc., 10 FCC Rcd 11509 (1995); Dubuque TV, 16 FCC Rcd 4396 (2001) (enforcing the advertising provisions under 47 C.F.R. § 73.670).

for failure to satisfy the “three hour rule.”<sup>184</sup> In addition, instead of addressing substantive arguments of non-compliance, the Commission has imposed fines on broadcasters for violations of their record-keeping and reporting obligations under the children’s television rules.<sup>185</sup> Despite these examples, the Commission has been notably slow in other instances even in response to advocacy group pressure. For example, several license challenges grounded on failure to air children’s educational programming have been pending since 2004.<sup>186</sup> The fact that the United Church of Christ’s license challenges have yet to be resolved after five years suggests some Commission ambivalence about UCC’s invitation to assess the substantive quality of the programming at issue.<sup>187</sup>

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<sup>184</sup> Shareholders of Univision Comm., Inc., 22 FCC Rcd 5842 (FCC 2007). *See also* notes 27, 77, *supra*. The Office of Communication of the United Church of Christ takes credit for that enforcement. *Landmark FCC ruling against Univision is result of UCC's public advocacy for children*, <http://www.ucc.org/news/landmark-fcc-ruling.html>. Admittedly, the Univision consent decree involved both a payment of \$24 million by Univision and a compliance agreement. It might be argued that such a significant fine and behavioral penalty can serve to deter broadcaster non-compliance in one instance, rendering additional enforcement cases unnecessary. Without unduly minimizing the effect of the Univision settlement, however, it should be noted that it took the FCC almost two years to conclude the matter, many stations were involved in that case, Univision agreed to the settlement because of its own transfer plans, that lengthy license terms can dilute the potential threat of a Univision-like penalty

<sup>185</sup> *See, e.g.*, UPN Television Stations Inc. WUPL(TV), 20 FCC Rcd. 15807.

<sup>186</sup> *See* note 27, *supra*. *See also* John Eggerton, *Alliance Eyes License Challenges*, Broadcasting & Cable, September 20, 2004, available at <http://www.broadcastingcable.com/article/154645-Alliance-Eyes-License-Challenges.php>; CHILDREN NOW REPORT, *supra* note 25, at 4.

<sup>187</sup> Children’s Media Policy Coalition Comments, *supra* note 25, at 19-21. The pending license challenges would require the Commission to second-guess the core programming claims made by the broadcasters. The definition of core educational programming focuses on whether the programming at issue was specifically designed for children and had education as a substantial purpose. The stations at issue claimed that they had engaged in a process designed to satisfy that standard. The challengers argued that the definition of core programming needed to be assessed by reference not to process but to outcome, requiring a conclusion as to the educational character of the episodes viewed. Consequently, the challengers included a statement by an education expert expressing his view that the station could not reasonably characterize the challenged children’s programming (*e.g.*, “Miracle Pets”) as core educational programming. It may be that the Commission’s delay has been influenced by its desire to avoid intrusive assessments of educational quality.

In addition, Commission action has been forestalled by the sale of non-compliant stations to new owners. *See, e.g.*, UPN Television Stations Inc. WUPL(TV), 20 FCC Rcd. 15807 (2005) (refusing to consider, in renewal application context, violations of children’s television rules that occurred prior to the

The children's advocacy community has responded to the Commission's delays by calling directly for rapid resolution of the challenges brought by interested parties.<sup>188</sup> But this recommendation, while eminently practical, does not address what may truly be motivating the Commission's delays – namely, ambivalence on the agency's part about direct assessment of programming content. To the extent that the Commission's delays and apparent acceptance of marginal core programming claims are due to the agency's hesitation to step too far into content review, this structural limitation is unlikely to disappear simply in response to urgings to be timely.

### 3. *Audience Factors:*

In addition to broadcaster economic incentives and FCC administrative factors, audience factors as well lead to the difficulties with over-the-air children's educational programming production. Specifically, information access issues, parental understanding, and children's viewership patterns all create hurdles for the broadcast children's E/I market.

The informational disclosure requirements of the children's E/I rules<sup>189</sup> were designed to accomplish two goals: 1) improve parental viewing choices by informing parents of the availability of E/I choices, and 2) provide evidence to help parents and children's advocacy groups pressure broadcasters to air more and better E/I

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date on which the petitioning broadcaster acquired the station). Today's lengthy license terms, along with the fact that compliance with the children's television rules is assessed at license renewal, suggests that there is ample time for non-complying stations either to mend their ways close to their renewal dates, or to be transferred to new owners. Either result diminishes opportunities for significant Commission enforcement of children's E/I rules.

<sup>188</sup> Children's Media Policy Coalition Comments, *supra* note 25, at iii, 19-21.

<sup>189</sup> See Section I, *supra*.



programming.<sup>190</sup> However, the disclosure mechanisms in the FCC’s rules have faced some practical difficulties. For example, many intermediaries – such as newspapers and television guides – have chosen not to print the details of children’s E/I programming information, making access to information difficult for parents.<sup>191</sup> The evidence shows that many parents are not aware of the three-hour processing guideline<sup>192</sup> and cannot decipher information related to children’s educational television offerings, *inter alia* because of lack of standardization.<sup>193</sup> At a minimum, there is variation in parents’ access to the requisite information.<sup>194</sup>

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<sup>190</sup> See 2004 Children’s DTV Report & Order, *supra* note 11, 19 FCC Rcd. at 22959, ¶ 45; 1996 Children’s Television Rules, *supra* note 11, 11 FCC Rcd. at 10682-83, ¶ 48, 52. It is beyond the scope of this Article to address the effectiveness and desirability of disclosure systems. Suffice it to say, however, that technology today has solved or reduced many of the collective action problems that might have undermined prior attempts to rely on citizen pressure to trigger regulatory responses. (This seems clear in the context of broadcast indecency, for example. See LILI LEVI, THE FCC’S REGULATION OF INDECENCY, FIRST AMENDMENT CENTER FIRST REPORTS, April 2008 at 4, 28-29 and sources cited therein.) Even if individual parents are unlikely to have the incentive to engage in dialogue on children’s television with broadcasters, and even if those parents who do are likely to be ineffective in obtaining significant results on their own, the information approach is likely to empower already-organized children’s advocacy groups and media watchdog groups with ties to the media. In addition, media researchers have concluded that local broadcasters select programming meeting the FCC’s “core” educational requirements by, among other things, looking for a “seal of approval” from independent groups. Amy Jordan & John Sullivan, CHILDREN’S EDUCATIONAL TELEVISION REGULATIONS AND THE LOCAL BROADCASTER: IMPACT AND IMPLEMENTATION (June 9, 1997) at 6. Moreover, the obligation to report information – including explanations for why a particular program should be viewed as educational – may well have some sort of inchoate deterrent effect on truly absurd positions by broadcasters. The information approach can also provide broadcasters and cable operators information about what their competitors are doing.

<sup>191</sup> TV Guide, for example, has apparently stopped indicating the educational nature of children’s shows. See Jordan, *Three-Hour Rule*, *supra* note 126, at 23. See also Comments of Center for Media Education et al., In the Matter of Extension of the Filing Requirement for Children’s Television Programming Reports, MM Docket 00-44 at 7 (June 12, 2000), [www.fcc.gov](http://www.fcc.gov) (and sources cited therein).

<sup>192</sup> Jordan & Woodard, *Growing Pains*, *supra* note 142, at 89; Kelly L. Schmitt, *Public Policy, Family Rules and Children’s Media Use in the Home*, Annenberg Public Policy Center, Report No. 35 (2000) (finding that parents were unaware of the existence of E/I programming or children’s television rules, and that children often chose what to watch without parental input)..

<sup>193</sup> The FCC requires that core educational programming be identified by displaying an “E/I” icon throughout the program, denoting that the program is “educational and/or informational.” FCC Consumer Facts: Children’s Educational Television, <http://www.fcc.gov/cgb/consumerfacts/childtv.html>; 19 FCC Rcd 22943, 22959 (FCC 2004). Kaiser Family Foundation, *Parents, Children and the Media*, June 2007, at 9, available at <http://www.kff.org/entmedia/entmedia061907pkg.cfm> (recent study finding that only 5% of young (2-6 year old) children’s parents knew the meaning of the E/I symbol.) Accord Jordan, *Three-Hour*

In addition to information access problems, evidence suggests viewing patterns that follow children-branded outlets. Children have been described as largely “destination viewers” of television.<sup>195</sup> When interviewed by social scientists, children respond that they watch channels rather than individual programs.<sup>196</sup> This has attracted significant numbers of the child audience to cable, as noted.<sup>197</sup> Parents also may well encourage such cable viewing patterns, once they trust a channel – often as a result of the channel’s child-related branding.<sup>198</sup> Given the availability of highly rated children’s programming on generally ‘child-friendly’ channels, rational working parents in search of a television babysitter<sup>199</sup> may well abandon over-the-air broadcasting for these purposes.<sup>200</sup>

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*Rule*, *supra* note 126, at 23-24. Jordan & Woodard, *Growing Pains*, *supra* note 142, at 89. See also Amy B. Jordan, *Public Policy and Private Practice: Government Regulations and Parental Control of Children’s Television Use in the Home*, in HANDBOOK OF CHILDREN & THE MEDIA 651 (Dorothy G. Singer & Jerome L. Singer eds. 2002); Kelly L. Schmitt, *Public Policy, Family Rules and Children’s Media Use in the Home*, Annenberg Public Policy Center Report No. 35 10-11 (2000)(*APPC Report No. 35*); Emory H. Woodard IV & Natalia Gridina, *MEDIA IN THE HOME 2000: THE FIFTH ANNUAL SURVEY OF PARENTS AND CHILDREN*, Annenberg Public Policy Center Survey Series No. 7, at 32-38 (2000).

<sup>194</sup> See FCC Parent’s Place: <http://www.fcc.gov/parents/Welcome.html>.

<sup>195</sup> See, e.g., Comments of Viacom, MM Docket No. 00-167.

<sup>196</sup> Daisy Whitney, *Special Report: Kids & Teens TV*, 22 TELEVISION WEEK 10, 2003 WL 9140498 (March 10, 2003), *supra* note 155.

<sup>197</sup> See, e.g., Alexander, *supra* note 44, at 497 (claiming that as of 2001, “children’s viewing went from 98% broadcast to 15%,” with more than 77% of children’s viewing moving to cable, and Nickelodeon capturing more than 50% of child viewing.) I

<sup>198</sup> Whitney, *supra* note 155, at 10 (describing Nickelodeon’s successful branding strategy). Such branding has been less successful in the over-the-air broadcast context.

<sup>199</sup> Victoria J. Rideout et al, *Zero to Six: Electronic Media in the Lives of Infants, Toddlers and Preschoolers 4* (2003), visited at [www.kff.org](http://www.kff.org) (on use of tv to occupy children when parents are busy).

<sup>200</sup> Although the Saturday morning children’s programming segment was a hallmark of American network television since the 1950s (see, e.g., MINOW & LAMAY, *supra* note 42, at 45), the networks responded to the fragmentation and flight of the child audience by leasing their Saturday morning dayparts to other programmers instead of producing their own children’s programming. See, e.g., Ahrens, *That’s All Folks*, *supra* note 133 (“The television battle for kids is over. Cable has won. The major networks –

This does not mean that the practical problems facing parents are insuperable or that children's viewing patterns are monolithic. While the information may not currently be disseminated very effectively in the print medium, it does appear in some print venues, current practices can change, and the Internet provides other avenues for access to information.<sup>201</sup> The FCC's children's web pages will become a very useful resource once the agency improves the content and accessibility of its site – a task Chairman Genachowski recently announced.<sup>202</sup> Similarly, although children are generally characterized as destination viewers, studies also show that they will follow particular shows<sup>203</sup> and knowledgeable parents can direct their children's viewing choices.<sup>204</sup> Nevertheless, the point is that the disclosure-based FCC regime imposes potentially significant transactions costs on all the participants. These in turn reduce the effectiveness of the rules as a practical matter.

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dogged by a decade of rising production costs, low ratings and failing ad revenues – have thrown in the towel . . .”); Brian Lowry, *NBC and Fox Hire Sitters for the Kids Television*, LA TIMES, Aug. 31, 2002, at F1 (describing NBC and Fox as “absentee landlords”). See also Alexander, *supra* note 44, at 496-97; Huston & Wright, *supra* note 44, at 11; Whitney, *supra* note 155.

<sup>201</sup> For example, the Children's Media Policy Coalition has recommended that the FCC require broadcasters to make their children's educational programming information available on their web sites (Children's Media Policy Coalition Comments, *supra* note 25, at 9), and some already do. See also John Eggerton, *Nets Team Up on V-Chip Primer*, BROAD. & CABLE, March 30, 2004; *Cable to Unveil Family TV Planning*, BROAD. & CABLE, April 1, 2004. TV Guide and local newspapers could potentially be persuaded to reverse their current practices (particularly if the information is made more standard and reported timely). Print sources of information could be increasingly supplemented by Internet sources with program ratings (See, e.g., Karen Goldberg Goff, *Watchful Rules for Television*, THE WASH. TIMES, April 13, 2003, 2003 WL 7709386 (listing groups that rate children's programs); C.W. Nevius, *Parents Fear Perils of Media, Poll Shows*, SAN FRAN. CHRONICLE, May 22, 2003, at A1, 2003 WL 3755728. Additional information for parents – including links to stations' family-friendly programs, is provided by the FCC. [www.fcc.gov/parents](http://www.fcc.gov/parents). The information could also be marketed to families through other venues – such as parenting magazines and other sources so long as organized children's advocacy groups mobilize to get the word out.

<sup>202</sup> Statement of Chairman Genachowski, *supra* note 10.

<sup>203</sup> CHILDREN NOW REPORT, *supra* note 25.

<sup>204</sup> This is obviously less true for viewing choices by teenagers, and the rules define children to include those from 0-16.

#### ***IV. “Pay an E/I Fee or Play” – An Alternative Model for Promoting Quality Children’s Educational Programs on Television:***

Given these critiques of the current E/I rules, there are two alternatives. One is to retain and enhance the existing rules – a position that has been taken by children’s advocacy groups.<sup>205</sup> FCC Chairman Genachowski’s recent hearing testimony does not disavow such a course. While this is a plausible alternative, particularly if the guidelines were revised as suggested by children’s advocates, the FCC and the reformers would still continue to fight an uphill battle.<sup>206</sup> Alternatively, the Commission could accept the fact that requiring commercial broadcasters to provide excellent children’s television is only a second-best solution and squarely study whether alternative means exist to help children more effectively. This Article suggests one specific alternative, but – because one could conceive of a variety of innovative possibilities – it first proposes a method of evaluation.

##### ***A. Five Evaluative Objectives:***

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<sup>205</sup> In comments before the FCC, for example, the Children’s Media Policy Coalition has recommended that the Commission should retain and strengthen the rules by: requiring broadcasters to schedule some E/I programming on weekdays; only counting programming toward the processing guideline if clearly identified as E/I and described on the station’s website; requiring broadcasters to air cognitive as well as pro-social E/I programming; acting quickly on complaints and petitions to deny; and clarify that broadcasters with common ownership in a market are not permitted to double count the same shows for their E/I program obligations. Children’s Media Policy Coalition Comments, *supra* note 25, at iii.

<sup>206</sup> This is inevitable with any kind of programming requirement that fights market forces and is contrary to the stations’ economic incentives: Although the Children’s Media Policy Coalition argues that “the processing guideline seems to be having the intended effect of providing “the appropriate counterweight to the market forces identified by Congress” ”(Children’s Media Policy Coalition Comments, *supra* note 25, at 4, citations omitted), it nevertheless is compelled to acknowledge its concern that few licensees are choosing to air more than the bare minimum of E/I programming. *Id.* at 5. Since broadcasters have not been able to develop a successful formula for profitable children’s E/I programming during the last decade – despite the existence of the processing guideline – it is likely that their compliance would continue to be grudging at best. This would in turn lead to increased costs of monitoring and, doubtless, legal costs.

As the FCC evaluates updating the children's E/I obligations, it should seek to encourage five objectives: programming quality, generation of programming directed toward needs and age groups otherwise underserved in broadcasters' local markets, flexibility for broadcasters to enhance innovation over time, administrability for the FCC, and empowering parents informationally. The Commission's prior statements of objectives have been less than pellucid.<sup>207</sup> This Article begins instead with the proposition that the most practically successful rules will be those that provide some sort of benefit to all the participants. Broadcasters would be benefited by flexibility in meeting their children's obligations. Flexibility would allow them to innovate in response to economic conditions and each station's needs at any given time. The FCC, in turn, would benefit from rules that would be comparatively easy to administer in order to promote accountability. Parents and children would benefit from easy access to accurate, complete and reliable information about available E/I programming, as well as easily accessible and reliable independent ratings of the quality of programming. Children would be benefited by access to an increased amount of high-quality programming geared to each age band in the community. This Article proposes a two-pronged pay-or-play type of approach that would satisfy all these objectives.

***B. The "Pay" Prong: E/I Fees to Fund Public TV's Children's E/I Programming***

Quality of children's E/I programming is much more likely to be enhanced if a successful subsidy program for children's programming on public broadcasting stations

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<sup>207</sup> See Section III.A, *supra*.

were developed.<sup>208</sup> Such an alternative might even lead to an increase in overall amount of educational programming for children. History shows that promoting children's television on non-commercial stations – which are not subject to the same economic incentives as their commercial counterparts – is likely to lead to the kinds of high quality results everyone would applaud. The question, then, is how to ensure adequate funding of such programming on public, non-commercial stations.<sup>209</sup>

A focus on public television – rather than ceding the field to cable – is necessary for at least three reasons. First, not everyone has access to cable television – an estimated 20% of the American households with televisions do not subscribe to cable or satellite service (presumably for reasons of cost).<sup>210</sup> Second, studies show that public television

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<sup>208</sup> Others as well have argued that it would be preferable to subsidize good children's E/I programming on PBS or elsewhere. See, e.g., MINOW & LAMAY, *supra* note 42, at 154-61, Henry Geller, *Public Interest Regulation in the Digital Era*, 16 CARDOZO ARTS & ENT. L. J. 341 (1998); Hazlett & Spitzer, (citing to Geller and describing his background as FCC General Counsel); Krotoszynski, *Into the Woods*, *supra* note 26, at 1243-46. See also HENRY GELLER & DONNA LAMPERT, CHARGING FOR SPECTRUM USE 11-17, 16 (1989) (arguing for spectrum fees rather than public trustee model); Gore Commission Report, *supra* note 68, at 65. Even the architects of the FCC's deregulatory, market-based policy in the Reagan years recommended that children's programming become a non-commercial broadcaster responsibility, subsidized by a spectrum fee on commercial users. Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 209-13, 247-55 (1982).

<sup>209</sup> There are those, of course, who criticize PBS programming – with some conservatives decrying its allegedly too-liberal programming and some liberals complaining about its taking on characteristics of commercial broadcasters. See, e.g., PECORA, *supra* note 44, at 99-110. For discussions of a trend by public television to capitalize on its "brand" and to engage in entrepreneurial enterprises to promote funding, see, e.g., Sylvia M. Chan-Olmstead & Youngwook Kim, *The PBS Brand Versus Cable Brands: Assessing the Brand Image of Public Television in a Multichannel Environment*, 46 J. BROAD. & ELEC. MEDIA 300 (June 1, 2002), 2002 WL 24783020. For critiques of marketing as the "tail wagging the dog" even in the PBS context, see, e.g., LAURA BUDDENBERG, WHO'S RAISING YOUR CHILD: BATTLING THE MARKETERS FOR YOUR CHILD'S HEART AND SOUL (2004); Sally Beatty, *Links Between Public TV in US and Underwriters Raise Marketing Concerns*, WSJ EUROPE, July 12, 2002, at N4, 2002 WL-WSJE 22217170. Also, critics complain that PBS only shows programs produced by a few sources and does not provide sufficient opportunities for independent producers. Montgomery *supra*.

<sup>210</sup> See James, *TV Networks Find Ways*, *supra* note 133. (In 1994, the Supreme Court in *Turner Broadcasting System, Inc. v. FCC*, 512 US 622 (1994) (*Turner I*) referred to the 40% of Americans without cable as supporting Congressional intent to protect free over-the-air television.) See also In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket 03-172, Tenth Annual Report, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-04-](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-)

programming is both more balanced – consisting of both cognitive and pro-social shows – and also overall of higher quality than cable television educational shows.<sup>211</sup> Also, upon closer examination, there are limits to the diversity of children’s educational programming on cable.<sup>212</sup> Third, the future of the cable business model is itself unclear. Currently, cable is sold to subscribers on a tiered basis, with groups of channels bundled into tiers. If that changes and subscribers are instead able to pay “a-la-carte” (only for the channels (or “mini-tiers”) that they want), then analogous profitability factors as have plagued broadcasters vis-à-vis children’s educational programming may bedevil cable as well.<sup>213</sup>

History shows that government funding of children’s educational programming is not a viable method for promoting public television E/I development. Congressional funding of overall public broadcasting in the US has been consistently criticized as

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[5A1.pdf](#), visited Aug. 15, 2004. Although cable passed 97% of US homes as of June 2003, only 63.7% actually subscribed to cable (from a high of 68% in 1998). The reduction in cable subscribership is attributable to the rise of direct broadcast satellite (DBS). With regard to the expense of cable, cable rates have been consistently increasing in the past twenty years; in fact, the increase in cable rates was the impetus for Congress’ adoption of the 1992 Cable Act.

<sup>211</sup> CHILDREN NOW REPORT, *supra* note 25. The commitment of public television to children’s educational programming is indisputable, with some public stations reputedly airing eleven hours per weekday of children’s E/I programming. NAB Comments, *supra* note 37, at 8-9.

<sup>212</sup> Although there is a significant amount of children’s programming on cable, Nickelodeon is the only cable network that positions itself as a kids-only network. Whitney, *supra* note 155, at 10. The Disney Channel is targeted to families. The Cartoon Network reaches for a broader audience. *Id.* (quoting Nickelodeon executive). Moreover, as for the Disney channel, although it is purportedly advertising free, its programming is effectively one long form advertisement for the universe of Disney programming and products. PECORA, *supra* note 44, at 84-90.

<sup>213</sup> See Michael Grebb, *Supplement – Kids and Family Programming*, MULTICHANNEL NEWS, May 17, 2004 at 34, 2004 WL 86212532 (quoting Discovery Networks spokesman as saying that “the network group could never have been able to launch such family-friendly channels as Discovery Kids or The Science Channel in an a-la-carte or mini-tier world.”). Even Nickelodeon – which began life as a commercial-free network – has so significantly incorporated advertising and merchandising into its structure that it too is not insulated from the problems posed for children’s programming by advertiser-support. On the history of Nickelodeon, see, e.g., PECORA, *supra* note 44, at 84, 91-99.

insufficient and often subject to ideological skirmishes.<sup>214</sup> The specific history of children's educational television is even more telling. In 1990, as part of the Children's Television Act legislation, Congress created the National Endowment for Children's Educational Television specifically to support children's educational television programming.<sup>215</sup> Unfortunately, however, Congress did not renew the funding for the endowment after 1995.<sup>216</sup> History thus gives us reason to expect that Congress would not consistently fund public broadcasting children's E/I programming efforts. In any event, even if the legislature had continued to appropriate funds under the Act, the endowment amounts would have been insufficient to promote significant growth in high-quality programming, which is particularly costly.<sup>217</sup> The fundamental lesson to be learned from the failure of the endowment is that despite across-the-aisle rhetoric supportive of children's education, it is unwise to rely on Congressional funding of programming in support.

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<sup>214</sup> American expenditures on public broadcasting are far lower than English or European funding. See Geller, *supra* note 208, at 364 (late 1990s comparisons). Public Broadcasting funding in the U.S. was \$430 Million in 2009. Lynn Elber, *PBS Chief says public broadcasting funding faring better under Obama than Bush*, MINNEAPOLIS STAR-TRIB. (Aug. 2, 2009). BBC funding in 2009 was approximately £3.4 billion (although Britain's parliament has threatened to reroute £130 million to other networks). Aaron O. Patrick, *BBC Prepares to Protect Funding*, WALL ST. J. (July 3, 2009).

<sup>215</sup> 47 U.S.C. § 394. See *supra* note 34.

<sup>216</sup> *Id.*

<sup>217</sup> See 47 U.S.C. § 394(h) ("There are authorized to be appropriated \$2,000,000 for fiscal year 1991, \$4,000,000 for fiscal year 1992, \$5,000,000 for fiscal year 1993, and \$6,000,000 for fiscal year 1994 to be used by the Secretary to carry out the provisions of this section.") Congress, however, appropriated only \$3 million for NECET up to 1993, (see Notices, Department of Commerce, 58 FR 15222-01, 1993 WL 76755 (1993)), \$1 million in 1994, (see Notices, Department of Commerce, 59 FR 14024-01, 1994 WL 92377(1994)), and \$2.5 million in 1995 (see Richard E. Wiley & Paul E. Misener, *Whither Goest NTIA? The Fate of a Federal Telecommunications Agency*, 48 FED. COM. L.J. 219, 230 (1996).) There is no evidence of appropriations after 1995.



An alternative to government funding is to require broadcasters to contribute a yearly E/I license fee into a public broadcasting fund.<sup>218</sup> This could ameliorate public television's perennial funding problem by having commercial broadcasters help fund children's public programming. The objective of the fund would be to assure a baseline, in addition to existing public television children's E/I programming, of E/I programming to make up for shows that broadcasters opted not to air themselves. The target amount should be the estimated cost of having public broadcasters air E/I programming at least equivalent to three hours per week for each stream of multicasting by all commercial broadcasters. The E/I fee could be established and allocated per broadcaster according to various plausible methods the comparative merits of which would most appropriately be explored in a public notice-and-comment context.<sup>219</sup> The E/I fee would be paid into a public television children's educational programming endowment fund akin to the original 1990 NECET fund. Disbursements from the fund would be made to public, non-profit producers of high quality E/I programming, preferably by an independent, non-governmental management entity. As described below, broadcasters could then earn

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<sup>218</sup> Some – such as former FCC General Counsel Henry Geller – have also suggested a kind of broadcast tax or license fee model. *See, e.g.,* Geller, *supra* note 208 (a license fee consisting of a percentage of broadcasters' profits, to be contributed to the public broadcasting service) and sources cited in note 208, *supra*. *See also* Steve Behrens, *Poll: 8 in 10 say commercial broadcasters should aid public TV*, CURRENT ONLINE, Jan. 25, 1999, at [www.current.org/dtv/dtv901g.html](http://www.current.org/dtv/dtv901g.html) (reporting poll results that 79% of adults would favor requiring commercial broadcasters to pay 5% of revenues into a public broadcasting fund).

<sup>219</sup> Some possibilities that come to mind would be: a percentage of earnings, a percentage of net revenues, a fee based on audience reached, a fee based on comparative ratings of existing children's shows, a fee based on the cost of the stations' best children's educational programming over some period of time, among other possibilities. It is beyond the scope of this Article to analyze all the possible methods of fee assignment. Suffice it to say, however, that such an analysis is necessary. For example, it is important to realize that a fee based on cost of programming creates perverse incentives for broadcasters to spend less on their E/I fare. If such an approach were to be recommended, therefore, it would have to contain counter-weighting elements. Similarly, to the extent that the fee were revenue-related, broadcasters' financial claims would have to be checked for accuracy. (The history of telephone rate regulation demonstrates that this kind of monitoring is expensive, time-consuming, and often ineffective.)

credits that would reduce or offset their E/I fees if they decided to air children's E/I programming themselves, based on the quality and effectiveness of the programming they offer in serving otherwise underserved needs of the children in their markets.<sup>220</sup> Finally, because one of the difficulties facing children's E/I programming is apparently the lack of media literacy on the part of the audience, the independent administrator of the E/I fund could be charged with the goal of increasing public understanding and awareness of the availability and benefits of such programming.

Of course, even proponents of a public interest fund approach recognize the "large obstacles" faced by prior broadcast tax proposals.<sup>221</sup> In fact, the FCC declined to adopt a pay-or-play system several years ago because of its concerns with pricing-related administrability.<sup>222</sup> And broadcasters have a powerful lobby on the Hill and significant clout with the local legislators whose campaigns they report.<sup>223</sup> This is why it is important to get the broadcasters to "buy in" to the E/I fee system.

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<sup>220</sup> See Section IVC, *infra*.

<sup>221</sup> Geller, *supra* note 208. See also Hazlett & Spitzer, *supra*, at 144. For example, broadcast tax models have been criticized for raising questions about valuation and calculation, imposing significant governmental monitoring costs, and increasing unpredictability in the amount of funding from year to year. They can also be used as an excuse by Congressional foes of public broadcasting to eliminate or significantly reduce government funding; why should Congress appropriate funds if at least some part of the public broadcasting service can get adequate private support? Moreover, to the extent that previously-suggested broadcast tax model would funnel funding to an undifferentiated public broadcasting pool, children's television could get lost in the competition for funds by those seeking to produce many different kinds of public good programming. In addition, the question of who is to decide what is produced becomes increasingly significant in light of accounts of governmental and public attempts to pressure public television.

<sup>222</sup> The Commission expressed concern that "would be required to determine how much broadcasters would have to pay other stations to air educational programming." 2004 Children's DTV Report & Order, *supra* note 11, 19 FCC Rcd. at 22955 ¶ 31.

<sup>223</sup> Kunkel, *Policy Battles*, *supra* note 52, at 46 (citing to characterization of NAB as "one of the nation's most effective industry lobbies").

One of the major benefits of a serious FCC public study of the subject is that it would begin revealing the parties' comparative preferences among various alternatives. Not only would the advantages and disadvantages of various possibilities be ventilated, but – perhaps even more importantly as a practical matter – the palatability of the approaches to each of the relevant parties could be comparatively established. Depending on the details, and particularly when paired with a pay-or-play exemption, a reasonable E/I fee system might well be significantly preferable to broadcasters than the current “three hour rule” – particularly in light of the possibility of strengthened enforcement under new legislation. Thus, an E/I fee system as proposed here might turn out to be more politically viable than would be predicted. As a practical matter, the FCC's inquiry into this kind of system might lead to another negotiated compromise – akin to the negotiated Joint Proposal that was ultimately adopted by the Commission for the digital television E/I rules in 2006.<sup>224</sup>

### ***C. The “Play” Prong: Bounded Discretion***

The proposed E/I fee should be paired with an option that would allow stations to minimize or avoid the fee by airing E/I programming themselves.<sup>225</sup> To ensure that the new regime would lead to an increase in programming quality, the broadcasters' obligations to pay the E/I fee should only be reduced if the stations air programming that

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<sup>224</sup> This is a descriptive prediction and not a ringing endorsement of such negotiated policies. That subject is beyond the scope of this paper.

<sup>225</sup> For other references to the possible benefits of sponsorship models, *see, e.g.*, Krotoszynski, *Into the Woods*, *supra* note 26, at 1245-1246; Sunstein, *Television and the Public Interest*, *supra* note 87, at 538; Kevin Ryan, *Communications Regulation – Ripe for Reform*, 17 *COMMLAW CONCEPTUS* 771, 818 (2009); Aryn Pedowitz, *Protecting the Public from Themselves: The First Amendment, Public Policy, and Our Failure to Protect Dissent*, 44 *SANTA CLARA L. REV.* 269, 300 (2003)

is rated highly in comparison to other E/I programming by nationally recognized rating surveys. The broadcasters should also be limited in the degree to which they could aggregate their children's E/I programming to weekend mornings. The credit applied to the broadcaster should be increased to the extent that the programming it airs meets needs are otherwise underserved in the broadcasters' local market. This provision is particularly necessary because some types of children's educational programming are not as underprovided as others, and any broadcaster attempts to respond to those disparities should be particularly rewarded.<sup>226</sup>

The E/I programming should be reviewed and rated for educational quality by rating organizations which must survey a substantial amount of E/I programming per year and rate programs on a curve (in rank order), rather than considering them singly.<sup>227</sup> Those ratings organizations do not currently exist in any official way. The work of rating the child-friendliness of television shows and movies has been done by private advocacy groups and a few social scientists in connection with FCC regulatory reviews. An industry of independent rating institutions could develop, particularly if their work were publicly funded.<sup>228</sup> It would be important for the ratings to be made publicly available

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<sup>226</sup> One of the witnesses who testified at the recent Senate Commerce Committee hearing on Rethinking the Children's Television Act explained that while there is an adequate amount of children's E/I programming for preschool aged children, children in the 6-11 age group were comparatively underserved. *See note 7, supra*. In addition, Children Now has complained that there is a disparity in the amounts of cognitive and social programming aired to satisfy the current three hour rule. If that were the case in a local market and the broadcaster might choose to air cognitive programming if doing so would lead to a greater reduction in its E/I fee obligation.

<sup>227</sup> Otherwise, broadcasters could circumvent the system by finding a program rater that would simply say their program was educational.

<sup>228</sup> One possibility would be that each E/I title would pay a rating fee to a rating fund. The manager of the rating fund would retain two or more ratings agencies which would survey all the E/I titles and rate them on a curve or rank them. A separate ratings fund would not be necessary as such, however. The independent entity charged with retaining ratings agencies could be funded from a small portion of E/I fund

and highlighted on the FCC's redesigned web site. Broadcasters should be allowed to use the ratings to promote their shows. The rating results could be used to establish credits to offset the participating broadcasters' E/I fees.

The Commission has not seriously explored<sup>229</sup> such an alternative. The CTA refers to something of a sponsorship alternative, but it has been ineffective because it has not been interpreted in a fashion tailored to broadcasters' incentives.<sup>230</sup> A well-crafted

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fees as well. These are the sorts of details that would be best worked out in the FCC's children's television proceeding.

<sup>229</sup> The Commission did ask for comments on a pay-or-play option in its 2000 notice of proposed rulemaking, (*see* Notice of Proposed Rulemaking, In the Matter of Children's Television Obligations of Digital Television Broadcasters, 15 F.C.C.R. 22946, 22954 ¶ 20 (2000)), but rejected that option in its 2004 digital television proceeding. 2004 Children's DTV Report and Order, *supra* note 11, 19 FCC Rcd. at 22955 ¶ 31. Most of the comments submitted in response to the 2000 NPRM did not address the pay-or-play question. The principal discussion was undertaken by the children's advocacy group Children Now. Comments of Children Now, In the Matter of Public Interest Obligations of Television Licensees, MM Docket 00-167, Dec. 15, 2000, at 28 et seq., available at [http://fjallfoss.fcc.gov/cgi-bin/websql/prod/ecfs/comsrch\\_v2.htm](http://fjallfoss.fcc.gov/cgi-bin/websql/prod/ecfs/comsrch_v2.htm). The Commission declined to adopt a pay-or-play approach because of a concern that "the "pay or play" approach would be difficult to administer . . ." 2004 Children's DTV Report and Order, *supra* note 11, at 22955 ¶ 31. *See also* note 208 and accompanying text.

<sup>230</sup> See 47 C.F.R. § 73.671 Note 2 (stating: "[l]icensees that do not meet these processing guidelines will be referred to the Commission, where they will have full opportunity to demonstrate compliance with the CTA (e.g., by relying in part on sponsorship of core educational/informational programs on other stations in the market that increases the amount of core educational and informational programming on the station airing the sponsored program . . .)")

It does not appear that any stations have thus far availed themselves of the pay-or-play option. Little can be concluded from this, however. This option, as defined in the Commission's rules, is in fact not an equally satisfactory alternative to the distribution of programming by the licensees themselves. The sponsorship option in the 1996 Report & Order, *supra* note 11 is not a realistic alternative to airing children's programming. After all, the pay-or-play option as designed in the Order entails additional costs and risks by contrast to compliance with the processing guideline by the simple airing of the minimal amount of children's core educational programming. Stations that have not aired the recommended number of hours of children's television cannot get FCC Staff-level approval of their renewal applications. Instead, they have to argue their case to the Commission, which imposes both costs (in both time and money) and risks of non-renewal or limited renewal. If license renewal is at stake every eight years, with no formal advice earlier, one might expect a licensee to do everything possible to get Staff approval rather than having to go before a political body. Moreover, the Commission has made it clear that it "has discretion to determine how much weight to give to a station's sponsorship of core programming on other stations in the market when evaluating the station's compliance with the CTA." 2004 Children's DTV Report & Order, *supra* note 11, at ¶ 50. This creates significant uncertainty for broadcasters and creates a disincentive to sponsorship. In addition, the Commission has interpreted the sponsorship option narrowly: "a licensee's sponsorship of programming aired on another station in the market does not relieve the license of the obligation to air educational programming, and . . . such efforts may be considered only "in addition to" consideration of the educational programming aired by the licensee itself." 2004 Children's DTV Report & Order, *supra* note 11, at ¶ 67 (citing to ¶ 138 of the 1996 Children's Programming Report & Order). This

option such as that proposed here enhances flexibility. It replaces bureaucratic FCC judgments with the broadcaster's own decision about its willingness and ability to produce or air quality children's educational programming on its own channels. Broadcasters can realistically and flexibly adjust to market conditions as assessed by the station at the relevant time. It permits the development of expertise (which may lead to higher quality children's educational programming)<sup>231</sup> and offers broadcasters the possibility of branding some of their digital streams as child-friendly venues. (As noted above, a fledgling experiment in such programming is already occurring with the Qubo service.<sup>232</sup>) Whatever the details, it is important that a pay-or-play option not turn into a tool for broadcasters to reduce their obligations to serve children. The structure of the proposed regime must account for broadcasters' incentives and be alert to the possibilities of gaming the system.<sup>233</sup>

The timing of this experiment is propitious, as American broadcasters have just switched to an entirely digital system and are presumably in the midst of determining the business models they will employ for their digital streams. It may be that some broadcasters will choose to air specialized children's programming streams in competition with cable. Qubo presents one model of a broadcast alternative to cable

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kind of requirement would naturally reduce station incentives to subsidize such programming on other stations.

<sup>231</sup> Sunstein, *supra* note 87, at 540.

<sup>232</sup> See note 37, *supra*.

<sup>233</sup> This is why an ordinary pay-or-play system alone is problematic. If the cost charged to subsidize PBS programming, for example, is too high, then the broadcaster will choose to air lower cost and lower quality E/I programming instead of paying for the better product. If it is too low, then PBS won't have adequate funds to produce high quality programming itself. Therefore, a pay-or-play model alone, at the discretion of the broadcaster is less desirable than an E/I tax with exemptions alternative to achieve the goal of increasing high quality children's educational programming. For different ways of gaming in the children's television context, see *supra* note 187.

children's channels.<sup>234</sup> As discussed above, changes in the children's television marketplace have led to greater profits flowing from some children's programming than had previously been the case,<sup>235</sup> and the multiple programming streams enabled by the digital conversion means that over-the-air broadcasters can more profitably choose to program for niche audiences than ever before. The ownership structures of other broadcasters might give some stations (such as ABC stations) to cable E/I programming (such as Disney fare) at favorable rates, thereby leading those stations to play rather than pay their E/I fees. At the same time, other broadcasters may well decide that paying for other entities to produce and air high quality E/I programming is more economical for them – even if they are compelled to pay far more than rock-bottom prices – than the confusion occasioned by attempts to find commercially viable E/I programming.<sup>236</sup> The goal of the alternative proposed here is to provide a flexible regulatory regime that will use principles of bounded discretion to promote more and higher-quality children's E/I programming than has been engendered thus far by the FCC's approach.

### ***Conclusion***

For more than a decade, the FCC has quietly imposed an obligation on each and every broadcaster to air children's educational programming – meaning programming specifically designed to serve children's educational and informational needs. Even though risk-averse broadcasters have all interpreted the obligation as effectively a rule requiring three hours per week of E/I programming, there has been no official

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<sup>234</sup> See note 37, *supra*.

<sup>235</sup> See Section III.E.1, *supra*.

<sup>236</sup> Since the 1996 Order went into effect, broadcasters' line-ups have been changing their children's E/I programming frequently.

Commission assessment of the efficacy of the rule. The private empirical studies that exist suggest a mixed picture: while most broadcasters do air three hours per week of what they claim is “core” programming, many of the shows can be criticized as insufficiently educational and overly focused on social rather than cognitive lessons. Moreover, children’s E/I programming is largely limited to the Saturday morning time block. The Commission has simultaneously sought to promote both high-quality educational programming and a hands-off attitude toward broadcaster editorial discretion. Similarly, it has sought to protect children from excessive commercialization while simultaneously requiring advertising-supported entities to air expensive, high-quality E/I programming. In light of broadcasters’ economic incentives and the structure of the broadcasting industry, these goals have each pulled in different directions, leading to unimpressive results for child viewers and paralysis at the Commission.

This Article contends that although the Commission’s rules would probably have been deemed constitutionally acceptable under the First Amendment had they ever triggered judicial review, they should nevertheless be revised as a matter of policy. In light of the reality of the children’s offerings on television (broadly conceived to include cable and DBS), and in light of the excellent children’s programming that is the hallmark of the public broadcasting system, this Article suggests that the FCC’s new inquiry focus on the desirability of an experimental shift to a realistic “pay an E/I fee-or-play” system under which broadcasters would have the choice of either airing high-quality programming as rated by independent ratings agencies, or of subsidizing the production of E/I programming on public stations via a fee contributed to an E/I fund to be administered by an independent entity. Hopefully, the structure of such a regime would



simultaneously reduce both game-playing by broadcasters and FCC involvement in expressive decisions. Instead of retreading old ground, the FCC now faces a perfect opportunity to engage the parties in a negotiated experiment of this kind. At a minimum, an experiment with such an approach might provide the data necessary to compare whether perceptible improvement over the current state of affairs could be generated by hybrid regulatory innovations generated by open negotiation processes.